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—*NW Bell Telephone Co.*

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—*Overseas Communications*

CC Docket No. 80–632

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—*North Carolina Radio Service, Inc.*
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Two-Way Mobile Radio

Application for review of Bureau action denying request for waiver to permit mobile station use of channel 14 frequencies at Pittsburgh, Pennsylvania denied. *Notice of Proposed Rulemaking* adopted proposing to reassign UHF channel 14 frequencies for both base and mobile station use for Domestic Public Land Mobile Radio Service.
—*Amendment of Section 22.501(k)*
CC Docket No. 82–759

FCC 82–499

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Section 22.501(k) and Table A of Section 22.501 of the Commission's Rules to allow Domestic Public Land Mobile Radio Service mobile units to operate on UHF channel 14 frequencies at Pittsburgh, Pennsylvania	CC Docket No. 82–759

MEMORANDUM OPINION AND ORDER
AND NOTICE OF PROPOSED RULEMAKING

Adopted November 5, 1982 Released November 12, 1982

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

1. The Commission is considering amending Section 22.501(k) and Table A of Section 22.501 of the Commission's Rules to allow UHF channel 14 frequencies at Pittsburgh, Pennsylvania, to be used by both mobile units and base stations. Presently, Section 22.501(k) of the Rules, which gov-

erns Domestic Public Land Mobile Radio Service (DPLMRS), restricts use of channel 14 frequencies exclusively to base station operations and channel 18 frequencies only to mobile unit operations. It has been brought to our attention by Associated Communications of America, Inc. (ACA), in a request for waiver of Section 22.501(k)[1] that channel 18 frequencies cannot be used by mobile units in the Pittsburgh area because use of those frequencies would cause harmful interference to nearby UHF television stations transmitting on adjacent channels.

2. Our engineering staff has determined that channel 18 frequencies are virtually unusable for DPLMRS operations in the Pittsburgh area. The base station of the mobile units operating on Channel 18 in the Pittsburgh area would be short spaced to UHF TV Station WJAN at Canton, Ohio, operating on channel 17, and UHF TV Station WJNL at Johnstown, Pennsylvania, operating on channel 19.[2] In order to make available UHF frequencies for two-way DPLMRS service in the Pittsburgh area, we propose to assign half of the channel 14 frequencies for mobile use, and the other half for base station use. Therefore, we propose to amend Section 22.501(k) and Table A of Section 22.501, as follows: (a) delete the channel 18 allocation for Pittsburgh; (b) assign 12 channels in the 470 MHz band for base station use; and (c) assign 12 channels in the 473 MHz band for mobile unit use.

3. Since the proposed change results in a reassignment of allocated spectrum which would apply to all potential users, we believe that we should proceed by rulemaking rather than individual waiver requests. We have already determined there is a public need for DPLMRS in the Pittsburgh area,[3] and, we anticipate little, if any, opposition to this proposal. Thus, we expect to complete this proceeding in an expeditious manner.

---

[1] The Common Carrier Bureau, pursuant to delegated authority, denied the waiver request to use channel 14 for mobile unit operations, on the grounds that a waiver was not the proper vehicle for a rule change. ACA filed an application for review of that decision. In our Memorandum Opinion and Order in Docket 21039, 69 FCC 2d 1555 (1978), we found that the UHF frequencies would be available to carriers on a joint-use basis rather than an individually-licensed basis. Because all potential joint users would be affected by the proposed change, we agree with the Common Carrier Bureau that this rulemaking proceeding is preferable to an individual waiver proceeding. We therefore deny ACA's application for review.

[2] To insure protection for UHF stations, Section 22.501, Table G, requires a 90 mile separation between a base station and a protected UHF television station where the mobile unit associated with that base station operates on an adjacent UHF channel. Section 22.501(l)(1) permits base station operations only within 50 miles of the geographic center of Pittsburgh. Commission records indicate that WJAN and WJNL are 72.9 and 48.2 miles from Pittsburgh, respectively. Section 22.501 (5)(ii) of the Rules allows for separation distances less than 90 miles upon a proper engineering showing and coordination with the Broadcast Bureau. The grant of a construction permit to WJNL to move to within 48.2 miles of Pittsburgh makes an engineering showing difficult, and, in fact, the criteria for a proper showing are such that the downtown area of Pittsburgh cannot be served.

[3] See First Report and Order in Docket No. 18261, 23 FCC 2d 235, 337 (1970), and Second Report and Order in Docket No. 18261, 30 FCC 2d 221, 232–234 (1971).

Proposal

4. In view of the foregoing, we tentatively conclude that there is a need to modify the allocation for two-way use in Pittsburgh, Pennsylvania, from that which was originally made in Docket 21039. Accordingly, under Sections 4(i), 303(g) and (4) and 307(b) of the Communications Act of 1934, as amended, the Commission proposes to amend Section 22.501(k) and Table A of Section 22.501 of the Commission's Rules, as set forth in the Appendix to this Notice.

5. The Commission invites comments on this proposal. The procedures to be followed in submitting comments in this proceeding are similar to those followed in proceedings to amend the FM or Television Table of Assignments in Section 1.420 of the Commission's Rules. The procedures are discussed below.

6. *Cut-off procedures.* The following procedures govern the consideration of filings in this proceeding—

(a) Counterproposals made in this proceeding will be considered if they are made in initial comments, so parties may comment on them in reply comments. Counterproposals will not be considered if made in reply comments (See Section 1.420(d) of the Commission's Rules).

(b) Petitions for rulemaking which conflict with the proposal in this Notice will be considered as comments. Public notice to this effect will be given so long as the comments are filed before the date for filing initial comments. If they are filed after that date, they will not be considered in connection with the decision in this proceeding.

7. *Dates and service.* Under the procedures set out in Section 1.415 and 1.420 of the Commission's Rules, interested parties may file comments on or before *December 13, 1982* and reply comments on or before *December 28, 1982*. All submissions made by parties to this proceeding or on behalf of such parties must be made in written comments, reply comments or other appropriate pleadings. Reply comments must be served on the person(s) who filed comments to which the reply is directed. These comments and reply comments must be accompanied by a certificate of service. (See Section 1.420(a)–(c) of the Commission's Rules).

8. *Number of copies.* Under Section 1.420 of the Commission's Rules, an original and four copies of all comments, reply comments, pleadings, briefs or other documents must be submitted to the Commission.

9. *Public inspection of filings.* All filings made in this proceeding are available for inspection during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

10. *Ex parte contacts.* For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that

ex parte contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally,* Section 1.1231 of the Commission's rules, 47 C.F.R. § 1.1231.

Regulatory Flexibility Act

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to this rulemaking proceeding to amend the table of assignments for base and mobile stations in the Domestic Public Land Mobile Radio Service at Pittsburgh, Pennsylvania. The proposal relates to only one city, Pittsburgh, Pennsylvania, and the proposal will not have a significant economic impact on a substantial number of small entities.

12. IT IS FURTHER ORDERED That the Application for Review filed by Associated Communications of America, Inc., IS DENIED.

13. The Secretary shall cause a copy of this Notice of Proposed Rulemaking to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico Secretary

APPENDIX

1. The Commission proposes to amend 47 CFR § 22.501(k) as follows:

22.501 * * *

(k) * * *

Pittsburgh

Channel 14	Channel 14
470.0125	473.0125
470.0375	473.0375
470.0625	473.0625
470.0875	473.0875
470.1125	473.1125
470.1375	473.1375
470.1625	473.1625
470.1875	473.1875
470.2125	473.2125
470.2375	473.2375
470.2625	473.2625
470.2875	473.2875

* * * * *

2. The Commission proposes to amend 47, CFR § 22.501, Table A, as follows:

TABLE A.—FREQUENCY AVAILABLE FOR LAND MOBILE USE

Urbanized area	*Geographic center*		*Frequencies (MHz)*
	N. latitude	*W. longitude*	
Boston, Mass	42°21′24″	71°03′24″	Channel 14 470–476. Channel 16 482–488.
Chicago, Ill	41°52′28″	87°38′22″	Channel 14 470–476. Channel 15 476–482.
Cleveland, Ohio[1]	41°29′51″	81°41′50″	Channel 14 470–476. Channel 15 476–482.
Dallas, Tex	32°47′09″	96°47′37″	Channel 16 482–488.
Detroit, Mich.[2]	42°19′48″	83°02′57″	Channel 15 476–482. Channel 16 482–488.
Houston, Tex	29°45′26″	95°21′37″	Channel 17 488–494.
Los Angeles, Calif	34°03′15″	118°14′28″	Channel 14 470–476. Channel 20 506–512.
Miami, Fla	25°46′37″	80°11′32″	Channel 14 470–476.
New York, Northeastern New Jersey.	40°45′06″	37°59′39″	Channel 15 470–476.
Philadelphia, Pa	39°56′58″	75°09′21″	Channel 15 476–482. Channel 19 500–506. Channel 20 506–512.
Pittsburgh, Pa	41°26′19″	80°00′00″	Channel 14 470–476.
San Francisco–Oakland, Calif.	37°46′39″	122°24′40″	Channel 16 482–488. Channel 17 488–494.
Washington, D.C., Maryland, Virginia.	38°53′51″	77°00′33″	Channel 17 488–494. Channel 18 494–500.

[1] Channels 14 and 15 are not available in Cleveland, Ohio, until further order from the Commission.

[2] Channels 15 and 16 are not available in Detroit, Mich., until further order from the Commission.

Common Carrier, International Record Carrier
Common Carrier, Overseas
Common Carrier, Private Communications Services
Private Line Service

Applications of IRCs for authority to provide voice-only private line service between United States and United Kingdom granted. Public convenience and necessity will be served by grant of applications.
-FTC Communications

FCC 82–548

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of	
FTC COMMUNICATIONS, INC.	File No. I–T–C–82–087
For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire up to 16 satellite voice-grade circuits to provide voice leased channel service between the United States and the United Kingdom and beyond	
WESTERN UNION INTERNATIONAL, INC.	
For authority pursuant to Section 214 of the Communications Act of 1934, amended, to acquire up to 16 satellite voice-grade circuits to provide voice leased channel service between the United States and the United Kingdom and beyond.	File No. I–T–C–82–109
ITT WORLD COMMUNICATIONS, INC.	
For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire up to 16 satellite voice-grade circuits to provide voice leased channel service between the United States and the United Kingdom, and beyond.	File No. I–T–C–82–139

RCA GLOBAL COMMUNICATIONS, INC.

File No.
I–T–C–82–151

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire up to 16 satellite voice-grade circuits to provide voice leased channel service between the United States and the United Kingdom, and beyond.

TRT TELECOMMUNICATIONS CORPORATION

File No.
I–T–C–82–232

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire up to 16 satellite voice-grade circuits to provide voice leased channel service between the United States and the United Kingdom, and beyond.

MEMORANDUM OPINION, ORDER, AUTHORIZATION AND CERTIFICATE

Adopted December 8, 1982; Released: December 22, 1982

BY THE COMMISSION:

1. The Commission has before it for consideration applications filed by FTC Communications, Inc. (FTC), Western Union International, Inc. (WUI), ITT World Communications Inc. (ITT), RCA Global Communications, Inc. (RCA) and TRT Telecommunications Corporation (TRT) for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease facilities from Comsat to provide a statistically multiplexed leased channel service for voice-only use between the United States and the United Kingdom and beyond.

2. These applications were filed and appeared on the Commission's public notice on the following dates

I–T–C–82–087	Filed:	11–22–81	PN: 1–6–82
I–T–C–82–109	Filed:	1–20–82	PN: 2–3–82
I–T–C–82–139	Filed:	3–8–82	PN: 3–17–82
I–T–C–82–151	Filed:	3–26–82	PN: 4–7–82
I–T–C–82–232	Filed	7–7–82	PN: 7–14–82

Comments on these applications were filed by the American Telephone and Telegraph Company (AT&T), the Communications Satellite Corporation (COMSAT) and RCA. WUI filed an opposition and response to these comments.

Background

3. Currently, the international record carriers (IRCs) offer several record services including Alternate Voice/Data (AVD) service which provides the customer with a dedicated, voice-grade circuit for voice or data communications alternatively, or both simultaneously within the limitations of the transmission medium. According to the applicants, the tariffed rate of an AVD circuit is relatively high since the charge for an AVD circuit must cover the full cost of the transmission medium used and the cost of conditioning the circuit for data use. The applicants state that there are many customers who need a circuit for pure voice communications, and have no data requirements. Thus, there is no need for the conditioned and dedicated bandwidth provided for under existing AVD tariffs. To meet this need the applicants and their U.K. correspondent, British Telecommunications International (BTI), have agreed to offer to the public a low-cost communications service providing full period voice communications between the U.S. and the U.K. The applicants have each requested authority to lease up to sixteen satellite voice grade circuits to provide this service.

4. The proposed service is based on microprocessor technology which statistically multiplexes voice conversations on private lines. It uses conversational pauses occurring in one channel to transmit speech from another channel, which results in maximum utilization of the transmission facility in a manner similar to existing TASI multiplication equipment. Since it relies on naturally occurring pauses in conversations which are not present in data schemes, these services cannot be used for data transmissions. The applicants maintain that this service will almost double the number of voice conversations that can be carried over conventional voice-grade circuits.

5. According to the applicants, use of the proposed circuit utilization techniques will permit a reduction in the applicants' tariff rates and in BTI's charges for a leased circuit. For example, the applicants expect to charge rates of $2,600 per month for voice only service, a savings of approximately 30% over the equivalent AVD rates.

6. The applicants state that there is a need for low-cost, voice-only leased channel service which is not being met. Only AT&T currently offers leased channels for voice-only use internationally. However, the applicants view AT&T's service as not being economically viable for many customers, since AT&T's rates have been either the same as or higher than AVD rates, despite the restriction against data use. In fact, AT&T's

current monthly charge for a private line voice circuit is $5066. Thus, the applicants see a need for the type of service proposed herein. Since revenues for voice-only private line service to overseas points of all telephone carriers was only $3,731,624 in 1979, or 0.4% of AT&T's overseas revenues, the applicants maintain that AT&T's revenues will not be significantly adversely affected by the proposed service.

7. The applicants acknowledge in their pleadings that there is an on-going Commission proceeding in Docket No. 80–632, 84 FCC 2d 622 (1980), which has under consideration "whether as a matter of policy; (1) AT&T should be authorized to provide international record services and (2) whether the IRCs should be authorized to provide international voice service." 84 FCC 2d at 631. Since the proposed service will have an insignificant effect on AT&T's overseas revenues and will not affect AT&T's ability to operate, the applicants maintain that their proposals should be granted. Moreover, the applicants view their proposal as being consistent with recent pro-competitive Commission decisions in the international arena. For example, in the *Dataphone* decision, 75 FCC 2d 682 (1980), AT&T was authorized to permit the secondary use of its international message toll service (IMTS) for the transmission of data to all parts of the world, in competition with the IRCs' various record services. The Commission noted that use of the IMTS in this manner would permit more efficient use of facilities, further the goal of increased consumer choice and lower rates, and stimulate innovation. The applicants view their proposed services as satisfying the same goals.

Positions of the Parties

8. AT&T cites the Commission's *TAT–4* decision, 37 FCC 1151 (1964), as precluding the IRCs from providing voice only service and AT&T from providing international record services. AT&T notes that the Commission has under consideration in Docket No. 80–632 removal of all service restrictions on all carriers providing international services. Although AT&T states that it supports the Commission's tentative conclusion that the public interest would be served by removal of the *TAT–4* service restrictions on all carriers, AT&T contends that action on the instant applications in advance of a decision in *TAT–4* would result in piece-meal erosion of a major policy proceeding. Accordingly, AT&T recommends that these applications be deferred until the Commission completes its re-evaluation of the voice/record dichotomy in Docket No. 80–632.

9. In response to IRC arguments in favor of authorizing the proposed services prior to action in Docket 80–632, AT&T argues that Commission waivers of *TAT–4* restrictions are not granted lightly. AT&T contends that the IRC's assertions that the impact of their proposed services on AT&T would be *de minimis* do not meet this heavy burden. In addition, AT&T argues that even if a single carrier's service might have a *de*

minimis effect on its revenues, if extended to other carriers and locations, the resulting effect would be substantial.

10. Comsat believes that the Commission should encourage the development of new technologies which offer more efficient use of facilities and new service options. Because the instant applications offer these benefits, Comsat supports the introduction of the proposed services on a developmental basis. According to Comsat, any new type of service or equipment must be carefully evaluated from technical, operational and policy view-points. Thus, it recommends that the applications be granted on a developmental basis for an initial period of one year to permit such an evaluation. In response to FTC's argument that a one-year authorization would destroy the economics of its service, Comsat indicated that it would not oppose a two year development authorization.

11. While the applicants state that no degradation in speech quality is apparent to the user from the use of statistical multiplex equipment, Comsat notes that extensive use of this equipment may cause a significant degradation of speech quality for derived and conventional circuits. In addition, Comsat states that the increase in voice carrying capability provided by the multiplex equipment results in a reduction of traffic carrying capability of the satellite facilities over which it is transmitted. According to Comsat, FM carrier sizes used in the INTELSAT network are geared to a certain "activity factor" or power level. Since the statistically multiplexed circuits will have a higher level of activity and power, Comsat states that certain adjustments may be necessary to avoid degradation to other services on the system.

12. Finally, Comsat notes that TDMA[1] will be introduced in the INTELSAT system commencing in the Atlantic Ocean Region in 1984. This technique will significantly increase achievable satellite capacity largely through the use of digital speech interpolation (DSI). Comsat states that use of TDMA/DSI will result in a 3-to-1 gain in capacity and is the foundation for INTELSAT growth in the Atlantic Ocean Region in the 1980's. However, because of the higher "activity factor" of statistically multiplexed circuits, these circuits will not be able to take advantage of the DSI technology and will be incompatible with the use of DSI. Thus, Comsat asserts that statistically multiplexed circuits will have to be segregated and treated in the same manner as private line data circuits. Comsat asserts that a careful evaluation of the applicants's proposals is required since TDMA/DSI is more efficient than the applicants' statistically multiplexed units for voice on a system-wide basis, does not degrade the quality of a voice channel, and may be negatively impacted by the applicants' proposals.

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[1] Time division multiple access is a technique which permits more cost effective utilization of available satellite capacity.

13. RCA filed comments in response to the applications and WUI filed an opposition and response to the AT&T, Comsat and RCA comments on its application. RCA believes that the Commission can authorize these applications as a limited exception to its policy under consideration in Docket No. 80–632, without prejudice to the ultimate disposition of the issues in that proceeding. Such an approach would be reasonable, states RCA, since the proposed service would have only a *de minimis* impact on AT&T's total overseas communications revenues. Alternatively, RCA believes that the proposed service could be regarded as experimental in nature and authorized for a limited period of time. According to RCA, an experimental authorization would permit the public to benefit from this new overseas service while reserving judgment on whether such a service should be authorized permanently until the outcome of Docket No. 80–632.

14. WUI believes the Commission may grant the instant proposals, but not as an exception to the *TAT–4* decision. According to WUI, the Commission's TAT–4 policy is based on public interest considerations which support limiting the scope of AT&T's operations. WUI states that it is not aware of any Commission policy which would support placing a limitation on the scope of IRC operations to protect AT&T from competition in the international marketplace. With respect to Comsat's arguments on the impact of statistical multiplexing on its system, WUI notes that Comsat's comments are speculative. Nevertheless, WUI has indicated that it would not be opposed to an experimental grant of authority.

Discussion

15. In a separate item today, we have taken action to make clear a Commission policy permitting record carriers to provide voice-only services.[2] Having clarified this policy issue, we must now determine if these applications are in the public interest. After consideration of the applications, pleadings and our order today in Docket No. 80–632, we find that authorization of the proposed services will serve the public interest.

16. The standard governing additional competitive entry for voice service in a given market is set forth in *FCC v RCA Communications, Inc.* 346 U.S. 86 (1953). Under *RCA* the Commission must determine whether competition is reasonably feasible in those markets sought to be served and that added competition is in the public interest. Feasibility of competition "...depends on whether there is sufficient traffic to support the addition of another competing direct circuit and upon the effect of opening of such circuit upon the applicant as well as all other carriers providing service to the public." *Mackay Radio and Telegraph Co.*, 28

[2] We have also removed the *TAT–4* restriction on AT&T's provision of international record services.

FCC 231 (1960). In determining whether added competition is in the public interest, "the Commission is not required to make specific findings of tangible benefit....but the Commission must at least warrant...the competition would serve some beneficial purpose such a maintaining good service and improving it." 346 U.S. at 96–7.

17. Applying this standard to the instant case, we find that competition is reasonably feasible and that the authorization of the proposed services is in the public interest. Data on file with the Commission indicates that AT&T's chargeable minutes for overseas MTS service increased from 93,740,494 in 1977 to 261,116,826 in 1981. Although revenues for its voice only private line service declined slightly during this period, AT&T's revenues for all private line services increased from $1,441,641 to $4,877,493.[3] Therefore, it appears that competition is reasonably feasible in the international voice communications market. Moreover, AT&T has not demonstrated that the provision of voice-only leased channel service by the IRCs will impair its ability to continue to provide adequate service to the public. On the contrary, in 1981 AT&T's revenues from all overseas private line service amounted to less than one-half of one percent of AT&T's total overseas revenues. Thus, the provision of voice-only lease channel service by the applicants clearly will not impair AT&T's ability to provide adequate service to the public. Our action today in Docket No. 80–632 resolves AT&T's final concern that action on these applications not precede final action in the *TAT–4* proceeding.

18. The applicants have indicated that many customers need a circuit for constant voice communications and have no data requirements. Currently, the IRCs offer AVD circuits which provide customers with a voice capability. However, because the circuit must be conditioned for data, the cost of the circuit is increased. Alternatively, a customer requiring voice-only communications may subscribe to AT&T's voice-only leased channel service. Tariffs on file with the Commission indicate that the current IRC rate for AVD service is $3710.00 per month compared to AT&T's monthly rate of $5,066 for voice-only leased channel service. The applicants have indicated that they expect to charge approximately $2600.00 per month for voice-only leased channel service. Based on these figures, it appears that proposed services will result in significant savings for those customers which require voice-only leased channel service. Thus, authorization of the instant proposals will: 1) provide customers with increased flexibility and a wider range of service options in meeting their communications needs; 2) result in lower cost voice-only leased channel service being made available to the public; and 3) promote more efficient use of available satellite facilities.

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[3] AT&T Annual Report, Form M, December 1977 through December 1981. *See also* paragraphs 48 and 49 of our order in Docket No. 80–632 which we adopt today.

19. Moreover, authorization of the voice-only leased channel services proposed herein is consistent with our pro-competitive policies in the international arena. In the *Dataphone* decision, AT&T was authorized to use its international message toll service (IMTS) for the transmission of data to all parts of the world in competition with the IRC's record services. In an accompanying order, the IRCs were permitted to remove restrictions on voice use of Datel service worldwide. *Western Union International, Inc.*, 76 FCC 2d 166 (1980). In both instances we noted that improved customer choice, lower rates and a more efficient utilization of existing common carrier facilities would result.

20. Although Comsat has indicated that it supports introduction of the new technology proposed by the applicants, it points to the potential problems associated with the use of statistical multiplexing techniques on the INTELSAT system. Specifically, Comsat suggests that an increase of the use of statistical multiplexing techniques may cause significant degradation of speech quality on all satellite circuits. In addition, Comsat states that the use of the statistical multiplexing techniques proposed herein may be imcompatible with TDMA/DSI technology it plans to introduce in 1984. Despite these arguments it does not appear that a grant of developmental or experimental authorization as suggested by Comsat is warranted in this case. First, multiplexing, in general, is not a new technique. Different forms of multiplexing techniques are employed by the IRCs to derive additional channels on satellite as well as cable facilities. The statistical multiplexing proposed herein is another such form. Moreover, this technique is analogous to TASI techniques used by AT&T in that they use normal pauses occurring in conversations to derive additional capacity. Secondly, although statistically multiplexed circuits have a higher "activity factor" which may cause degradation to other services on the system, Comsat admits that these circuits are similar to AVD circuits in this regard and can be treated accordingly. Thus, it does not appear that mutiplexed circuits should present a, unique problem for Comsat. Finally, if the statistical multiplex techniques employed by the applicants are incompatible with the introduction of TDMA/DSI technology, we can consider this problem at such time as TDMA/DSI becomes available.

21. In view of the foregoing, it is hereby certified, that the public convenience and necessity will be served by a grant of these applications.

22. Accordingly, IT IS ORDERED, that the applications of FTC Communications, Inc., Western Union International, Inc., RCA Global Communications, Inc., ITT World Communications Inc., and TRT Telecommunications Corporation for authority to provide voice-only private line service between the United States and the United Kingdom ARE GRANTED; and FTC, WUI, RCA, ITT and TRT are each authorized to:

(a) lease up to sixteen satellite voice-grade circuits between an earth station on the East coast of North America and an appropriate Atlantic satellite;

(b) lease necessary connecting circuits between an appropriate East Coast earth station and their New York, New York Operating centers;[4] and

(c) use these facilities for the provision of all authorized services including voice-only leased channel service.

23. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

24. This authorization is effective on its release date and shall be continued year-to-year, beginning January 1, 1983, unless the Commission notifies the applicant to the contrary and requires a new application by December 1 of the current authorization term.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico Secretary

[4] RCA is also granted authority to lease connecting facilities between its Kingsbridge Campus, New Jersey operating center and an appropriate east coast earth station.

Comparative Criteria
Diversification of Control
Ownership and Management, Integration of

Review Board granted construction permit to applicant with substantial diversification and moderate integration preferences compared to opponent with no preferences. On these facts, first applicant was over-whelming choice. Summary decision on winner's financial qualifications affirmed.

—*Hassayampa Broadcasting*
BC Docket No. 81–357

FCC 82R–70

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Richard A. Peterson and Stanley H. Watson, d/b/a HASSAYAMPA BROADCASTING Wickenburg, Arizona	BC DOCKET NO. 81–357 File No. BPH–800605AB
SHOBLOM BROADCASTING, INC. Wickenburg, Arizona	BC DOCKET NO. 81–358 File No. BPH–800829AP
For Construction Permit for a new FM station	

Appearances

Thomas L. Root, on behalf of Hassayampa Broadcasting; *Peter Tannenwald* and *Gerald E. Oberst, Jr.*, on behalf of Shoblom Broadcasting, Inc.; and *Brian P. Kilbane*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

Adopted: November 23, 1982; Released: November 29, 1982

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. This proceeding involves the competing applications of Hassayampa Broadcasting and Shoblom Broadcasting, Inc. to construct a new FM station in Wickenburg, Arizona. In addition to the standard comparative issue, a limited financial issue was designated against Hassayampa to determine the source and availability of additional funds needed to finance its proposal. *Hearing Designation Order*, 46 Fed. Reg. 30155, published June 12, 1981. By Memorandum Opinion and Order, FCC 81M–3572, released November 12, 1981, Judge Harrison granted summary decision in favor of Hassayampa under the financial issue, and by Initial Decision, FCC 82D–52, released July 21, 1982, the Judge found Hassayampa to be the preferable applicant under the comparative issue and therefore granted its application. The proceeding is now before the Review Board on exceptions filed by Shoblom. We have reviewed the Initial Decision and the Memorandum Opinion and Order, *supra*, in light of the exceptions and replies, the oral argument held November 5, 1982, and the record; except as modified below the ALJ's findings and conclusions wil be adopted and the grant to Hassayampa will be affirmed.

2. *Financial Issue.* This issue was specified because Hassayampa had insufficient funds available to it to meet its estimated costs of $86,874.50. Subsequent to designation, Hassayampa amended its application to specify reliance on cash on hand of $22,500, net deferred equipment credit of $36,177, net loans to its partners, Richard A. Peterson and Stanley H. Watson, of $28,500 and $23,750, respectively, and net liquid assets of Peterson and Watson of $9,126 and $16,321, respectively. While on their face, these figures amount to $136,374, well in excess of Hassayampa's actual requirements. Shoblom argues that its opponent has not shown that all the funds claimed are in fact available to it and that the ALJ's grant of summary decision was accordingly erroneous. We disagree. The ALJ correctly concluded, based on Hassayampa's amended application, that there was no genuine issue of material fact to be determined at the hearing. See Section 1.251(a)(1) of the Commission's Rules, 47 CFR 1.251(a)(1). In opposing the motion for summary decision, Shoblom, contrary to the express requirements of Section 1.251(b), relied on mere allegations rather than affidavits or other supporting materials.

3. Shoblom's brief and exceptions do not enhance its position. For example, it speculates that Hassayampa's deferred equipment credit cannot be relied upon because the equipment supplier's letter requires a final review of the applicant's financial condition at the time of grant. Such a requirement, however, is a common business practice and raises no question regarding availability of the credit. *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166 (1980); *Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 51 RR 2d 389 (Rev. Bd. 1982). We also reject Shoblom's

surmise that the proposed bank loans will not be made available to Hassayampa by its two partners. The suppliers of the funds (a bank and the father of one of the partners) specifically state that the proceeds are intended for construction and operation of the facility and the partners have committed themselves to finance the station.[1] *See Contemporary Television Broadcasting, Inc.*, 46 Fed. Reg. 9202, published January 28, 1981 (Hearing Designation Order); *Superior Broadcasting of California*, 49 RR 2d 1575 (ALJ 1981). Finally, Shoblom attacks the availability of funds already credited Hassayampa in the *Hearing Designation Order* and while it conceded at oral argument that its real concern was whether these funds overlapped with the net liquid assets relied upon by Hassayampa partners, we point out that even if we discounted the latter amounts Hassayampa would still have approximately $110,000 to meet its costs of under $87,000. In sum, there is no question that Hassayampa is financially qualified.

4. *Diversification of Control.* Hassayampa and its principals own no media interests whereas Shoblom is the licensee of KUUK(AM), the only broadcast station in Wickenburg, and is the licensee of an AM-FM combination in Lake Havasu City, Arizona, as well as the permittee of a low-power television station in that community. We agree with the ALJ that under these facts Hassayampa's diversification preference is substantial, if not "well-nigh overwhelming," *KBBS, Inc.*, 91 FCC 2d 115, 52 RR 2d 185 (Rev. Bd. 1982), because it will create a new media voice in Wickenburg and avoid the creation of an electronic media monopoly. That Shoblom's proposed FM station will complement its existing daytime only AM station in Wickenburg is something of a mitigating factor but does not reduce Hassayampa's preference to less than substantial. *See Colorado West Broadcasting, Inc.*, 57 FCC 2d 526, 35 RR 2d 1637 (Rev. Bd. 1976); *KALT-FM, Inc.*, 49 FCC 2d 61, 31 RR 2d 765 (Rev. Bd. 1974); *Blancett Broadcasting Co.*, 17 FCC 2d 277, 15 RR 2d 1349 (Rev. Bd. 1969). Several rulemaking proceedings on which Shoblom relies (Br. 12–13) do not purport to change this diversification preference which flows from the Commission's basic comparative policy statement. Moreover, while Shoblom argues that there is no overlap between the primary service contours of its Lake Havasu City stations and the proposed FM station, this circumstance does not change the significance of the stark differences in media control by the two applicants in this case. Accordingly, we affirm the preference awarded by the ALJ.

5. *Integration of Ownership and Management.* Hassayampa was awarded a substantial integration preference because it proposed to integrate full-time one of its two general partners, Richard A. Peterson,

[1] Hassayampa Amendments filed July 13, 22, and 31, 1981; see Orders, FCC 81M–2696 and FCC 81M–2600, released August 20, 1981; Hassayampa Exh. 1, Exh. 2, p. 5, Exh. 3; Tr. 36.

as general manager, whereas Shoblom had not committed itself to any integration. While Shoblom concedes that it "does not claim credit for any definite percentage of integration in the traditional manner" (Br. at 18), it nevertheless argues that it should receive consideration for the proposal of its owner, Lee R. Shoblom, to supervise initial construction and operation, to travel to Wickenburg when necessary in the future, and to maintain a room there. However, Mr. Shoblom's proposal, which the applicant admits does not even amount to as many as twenty hours a week (Tr. 58), is non-permanent and too tangential to be awarded any integration credit. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 n. 6, 5 RR 2d 1901, 1909 n. 6 (1965); *Midwest Broadcasting Co.*, 70 FCC 2d 1489 (Rev. Bd. 1979). In accordance with our recent precedent, we consider Hassayampa's advantage for integration to equate to a moderate preference. *See Communictaions Properties, Inc.*, FCC 82R–64, released November 16, 1982, and cases cited at para. 9.

6. Shoblom's contention that the ALJ erred in not awarding it a preference for auxiliary power is not decisionally important since this would be no more than a very slight preference which could not outweigh the far more significant preferences awarded Hassayampa. *See Communications Properties, Inc., supra.*

7. *Summation.* Hassayampa has been found financially qualified and entitled to a substantial preference for diversification and a moderate preference for integration, whereas Shoblom has received no preferences. Since diversification is a factor of primary significance and integration is the most important element of best practicable service, *see Policy Statement, supra,* it therefore requires no elaboration to conclude that Hassayampa is the overwhelming comparative choice and that the ALJ's ultimate conclusion should be affirmed. A grant to Hassayampa will serve the public interest, convenience and necessity.

8. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend and for re-opening of the record to accept amendments, filed September 3 and November 16, 1982, by Shoblom Broadcasting, Inc., ARE GRANTED; and

9. IT IS FURTHER ORDERED, That the application of Hassayampa Broadcasting (File No. BPH–800605AB) for a construction permit to establish a new FM station in Wickenburg, Arizona, IS GRANTED, and the application of Shoblom Broadcasting, Inc. (File No. BPH–800829AP) IS DENIED.

Federal Communications Commission

Joseph A. Marino Chairman, Review Board

FCC 82D–52

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Richard A. Peterson and Stanley H. Watson, d/b/a HASSAYAMPA BROADCASTING, INC. Wickenburg, Arizona	BC DOCKET NO. 81–357 File No. BPH–800605AB
SHOBLOM BROADCASTING, INC. Wickenburg, Arizona	BC DOCKET NO. 81–358 File No. BPH–800829AP
For Construction Permit for a new FM station.	

Appearances

Thomas L. Root on behalf of Hassayampa Broadcasting; *Peter Tannenwald* on behalf of Shoblom Broadcasting, Inc. and *Brian P. Kilbane* and *Arthur Steinberg* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE BYRON E. HARRISON

Issued: July 15, 1982; Released: July 21, 1982

PRELIMINARY STATEMENT

1. By *Hearing Designation Order*, released June 4, 1981 (46 FR 30155, published June 12, 1981), the Chief of the Broadcast Bureau (Bureau) acting by delegated authority, designated the mutually-exclusive applications of Hassayampa Broadcasting (Hassayampa) and Shoblom Broad-

casting, Inc. (Shoblom) for a comparative hearing. The following issues were designated against the applicants:

(1) To determine with respect to Hassayampa:
  (a) The source and availability of additional funds over and above the $23,204,00; and
  (b) Whether in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.
(2) To determine whether Hassayampa's public affairs programming policy complies with the Fairness Doctrine.
(3) To determine if Hassayampa's EEO program is in compliance with Section 73.2080.
(4) To determine with respect to Shoblom:
  (a) The source and availability of additional funds over and above the $31,583.00 indicated; and
  (b) Whether in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.
(5) To determine which of the proposals would, on a comparative basis, better serve the public interest.
(6) To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications, if any, would be granted.

2. On July 13, 1981, Shoblom filed a Petition for Leave to Amend its application to respond to the financial issue designated against it (Issue 4). The petition was accepted by *Order*, FCC 81M–2587, released August 19, 1981. On September 11, 1981, Shoblom filed a Motion for Summary Decision in its favor with respect to Issue 4, which petition was supplemented on September 14, 1981 and September 17, 1981. Summary decision was granted and the financial issue was resolved in Shoblom's favor by *Order*, FCC 81M–3588, released November 12, 1981.

3. On August 20, 1981, Shoblom filed a Petition for Leave to Amend its application to report the filing of an application for construction permit for a new television translator station with low power origination capability. The petition was granted by *Order*, FCC 81M–3042, released September 24, 1981.

4. On March 26, 1982, a construction permit for a low power television station at Lake Havasu City was granted (call sign K45AJ). Shoblom filed a Petition to Reopen the Record and to Amend its Application to note the construction permit granted on March 26, 1982.

5. Hassayampa tendered an amendment to its application responsive to issues designated against it and petitioned for leave to further amend on July 22 and July 31, 1981. The petitions were granted by *Order*, FCC 81M–2600 and *Order*, FCC 81M–2596, both released August 20, 1981.

6. On September 11, 1981, Hassayampa filed a Motion for Partial Summary Decision in its favor with respect to the financial, Fairness Doctrine

and EEO issues designated against it. Hassayampa petitioned further for leave to amend its application with respect to financial matters on October 15, 1981, which petition was granted by *Order* (FCC 81M–3523, released November 6, 1981). A summary decision was granted on the financial and Fairness Doctrine issues by *Memorandum Opinion and Order*, released November 12, 1981 (FCC 81M–3571). A request for permission to appeal was denied by *Order* released January 25, 1982 (FCC 82M–0237).

7. Hassayampa again petitioned for leave to amend its application on January 29, 1982 to supplement the EEO showing in its application. The amendment was accepted by *Order* released February 19, 1982 (FCC 82M–0528). Hassayampa also filed a motion for partial summary decision on the EEO issue which was granted and the EEO issue was resolved in Hassayampa's favor by *Order* released February 24, 1982. As matters now stand, Hassayampa has by summary decision resolved favorably to it the financial, Fairness Doctrine and EEO issues as set out in the Designation Order.

8. The hearing was held on March 8, 1982 and the record was closed on that date. On the day of the hearing, Shoblom filed a Petition for Leave to Amend its application to report the filing of an application to increse the power of Station KUUK(AM), Wickenburg, Arizona.[1]

9. Shoblom's unopposed Motion to Correct Transcript was granted by *Order* released April 15, 1982 (FCC 82M–1202). On April 22, 1982, a Petition to Amend and Reopen the Record was filed by Shoblom. This amendment reported that Shoblom had received a construction permit for a new low-power television station to operate at Lake Havasu City, Arizona (call sign K45AJ). The amendment and the record was reopened and reclosed by *Order* released May 10, 1982 (FCC 82M–1489).

Findings of Fact on the Applicants

Hassayampa

10. Hassayampa is a general partnership organized under the laws of Arizona. Hassayampa has two general partners, Richard A. Peterson and Stanley H. Watson. Each partner has one vote in the determination of partnership affairs and Richard A. Peterson is vested by the partnership agreement with authority to and responsibility for construction and operation of the proposed radio station (Hassayampa Exhibit 1).

11. Hassayampa proposes to integrate Richard A. Peterson into the day-to-day management of its proposed radio station. He will have no other employment or business interests. As general manager, he will devote at least 40 hours per week to the position. Watson will not be

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[1] This Petition for Leave to Amend was granted by *Order* issued March 8, 1982 (FCC 82M–0784).

integrated into the operation of the proposed station (Hassayampa Exhibit 2, p. 3 and Hassayampa Exhibit 3).

12. Richard A. Peterson is a resident of Wickenburg, Arizona. Peterson first came to Wickenburg at the age of six in 1951. After graduation from high school, Peterson left Wickenburg for employment. He worked for one year as an announcer and salesman for Station KEOS in Flagstaff, Arizona. From there he spent one year as an announcer for Station KIMB at Kimball, Nebraska and a year later became the general manager of Station KRLN, Canon City, Colorado, an affiliate station of KIMB. A year later he became the general manager of another KIMB affiliated station KKAN in Phillipsburg, Kansas. Thereafter, Peterson left that position in 1967 and formed his own corporation and purchased Station KBSN at Crane, Texas. Peterson was the full-time general manager of KBSN from 1967 to 1973 when he sold this station and purchased KBSN at Andrews, Texas. He was the owner-manager of this station until 1976. Thereafter, he operated an advertising agency in Austin, Texas for two years and moved back to Wickenburg in 1978. From 1978 through October, 1979, Peterson was the full-time general manager of Station KSWW (formerly KAKA). In October, 1979, he resigned to become a real estate broker.

13. Peterson has been a member of the Future Frontiers since 1978. He is a member of the Roundup Club, which is the name used by the Chamber of Commerce at Wickenburg and since 1979 has served as a director of the club. He has also been active in the Roundup Club in the planning and supervision of Wickenburg's annual "Gold Rush" days, an event sponsored by the Roundup Club (Hassayampa Exhibit 2, pp. 1–4).

14. Peterson will be the general manager of the proposed station and will be charged with hiring employees, directing the station's programming and such duties are similar to ones fulfilled by Peterson at KBSN and KKAN (Hassayampa Exhibit 2, p. 2).

Ownership of Mass Media

15. Neither Peterson nor Watson owns or has any interest in any other broadcast station, publication, cable television system or other medium of mass communications except for the interest of each in the instant application (Hassayampa Exhibit 2, pp. 2–3 as to Peterson; Hassayampa Exhibit 3 as to Watson).

Shoblom

Structure of Applicant

16. Shoblom is a corporation organized under the laws of Arizona. It was incorporated on June 25, 1971, for the purpose of engaging in broadcasting and related activities. All of the outstanding shares of stock (8,000

shares of common stock) of the corporation are owned by Lee R. Shoblom. There are no outstanding stock subscriptions, warrants or other obligations or securities involving an equity interest in the corporation. The officers of Shoblom are: Lee R. Shoblom, President and Treasurer and Denise A. Shoblom, his wife, Vice-President and Secretary (Shoblom Exhibit 1, p. 1; Tr. 56–57).

Ownership of Mass Media

17. Shoblom has the following other mass media interests:

(a) Licensee of KFWJ(AM), a 1 kW daytime-only station and KRFM(FM), a Class A FM station, at Lake Havasu City, Arizona (Shoblom Exhibit 1; Tr. 59, 67).

(b) Licensee of KUUK (AM), a 500-watt daytime-only station at Wickenburg, Arizona (Shoblom Exhibit 1).

(c) Permittee of low-power television station K45AJ, Lake Havasu City, Arizona, granted March 26, 1982.

The primary service contours of KFWJ and KRFM do not overlap the primary service contour of Shoblom's proposed FM station at Wickenburg, but the primary service contour of KUUK(AM) does overlap Shoblom's proposed FM primary service contour (Shoblom Exhibit 1).

18. Mr. Shoblom is a resident of Lake Havasu City, Arizona. At the present time, he is seeking a construction permit for a new AM and FM station at Yucca Valley, California and should such application be granted, he is committed to full-time residence in Yucca Valley. Even if such applications for Yucca Valley should not be granted, Mr. Shoblom will only travel to Wickenburg, Arizona when necessary to perform his duties, as he now does for Station KUUK(AM) at Wickenburg, Arizona (Shoblom Exhibit 2). Mr. Shoblom intends to personally supervise the construction of the proposed FM station at Wickenburg and the initial period of operation. For this purpose, he keeps a room at a ranch adjacent to the KUUK(AM) transmitter in Wickenburg, owned by his brother, Glenn Shoblom, who is the station manager of AM Station KUUK (Shoblom Exhibits 1 and 2). While Mr. Shoblom's actual time at the station is not quantified on the record, it will not be a commitment of as much as 20 hours a week on a regular basis (Tr. 58). Mr. Shoblom's entire business life has been devoted to his radio activities having had the positions of announcer, chief engineer, manager, public relations director, program director and broadcast station owner. While Mr. Shoblom does not live in Wickenburg, he has vacationed there since the early 1970's and he has attended some Rotary Club meetings in Wickenburg. Mr. Shoblom has no ownership interest, office or position in any other medium of mass communications other than those listed above through Shoblom (Shoblom Exhibit 2).

Conclusions of Law

1. This is a comparative proceeding between Richard A. Peterson and Stanley A. Watson, d/b/a Hassayampa Broadcasting and Shoblom Broadcasting, Inc. for a construction permit for a new FM broadcast station at Wickenburg, Arizona. Both applicants have been found to have the basic qualifications to be Commission licensees, and only the comparative issue now remains for resolution. Thus, the choice between the applicants must be made on the basis of their respective comparative qualifications. The traditional guideline for selecting between mutually-exclusive applicants is the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), hereinafter the "*Policy Statement*".

2. The leading comparative criterion in the *Policy Statement* is diversification of control of the media of mass communications. *Policy Statement, supra*, 1 FCC 2d at 394. Neither Hassayampa nor its partners have any other present interest in such media. Shoblom is the licensee of Stations KFWJ(AM) and KRFM(FM) and the permittee of Station K45AJ, Lake Havasu City, Arizona. It is also the licensee of KUUK(AM), Wickenburg, Arizona.[2] Therefore, Hassayampa is awarded a substantial and significant preference for diversification of ownership of mass media. Shoblom urges that the preference awarded to Hassayampa is far from decisive since the primary service contour of none of the Lake Havasu City stations will overlap the primary contour of Shoblom's proposed FM station in Wickenburg and the fact that Shoblom's existing AM station in Wickenburg is limited to service during daytime hours. Shoblom argues that the recent holding of the U.S. Court of Appeals in *Julie P. Miner* v. *FCC*, 662 F 2d 152 (D.C. Cir. 1980) as well as the Commission policy and prospective policy favoring the addition of full-time capability of daytime-only standard broadcast stations, preclude the awarding of a decisive diversification preference to Hassayampa based on Shoblom's ownership of Station KUUK(AM) in Wickenburg and the fact that the FM broadcast and low-power television station in Lake Havasu City does not warrant award of a decisive diversification preference to Hassayampa because the primary service contours of those stations do not overlap the service contours of either KUUK or the proposed FM station.

3. In *Julie P. Miner* v. *FCC*, *supra*, the Commission favored an applicant for a new standard broadcast station over the application of an incumbent licensee who proposed to change frequency and increase power, on the basis of diversification of ownership.[3] The Commission had

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[2] The record also shows that Shoblom has some pending applications for other communities. Such interests are not cognizable media interests.

[3] The final opinion on the matter was issued by the Review Board, *Julie P. Miner*, 60 FCC 2d 892 (1976). The Commission denied, without opinion, Miner's application for review by Order, March 22, 1978, 67 FCC 2d 1612.

held in *Julie P. Miner* that the applicant for the new facility would bring a second radio service to the community of license, while grant of the incumbent's application would only cause continuation of the first radio voice. The U.S. Court of Appeals reversed, holding that it was an error to assume a grant of the new applicant's application would bring a second service to the area, where the incumbent had stated, without rebuttal on the record, that she would discontinue operation of her station if the other application was granted rather than hers. The Court also found that the Commission could not assume that an applicant would apply for the frequency vacated by Miner. Thus, the Court found that there was a failure to engage in "reasoned decision making" and there were conclusions not based on "substantial evidence in the record as a whole." 662 F 2d at 160.

4. The Review Board in *Minneapolis Star and Tribune Co.*, FCC 82R–7, 88 FCC 2d 1604, 50 RR 2d 1481 (1982), has considered the meaning of *Julie P. Miner* v. *FCC, supra*. The Board held:

> "As we see it, Miner stands for two important principles: (1) the Commission cannot award comparative preferences based on unsupported suppositions of increased diversity; and (2) 'controlled competition without equal access to the marketplace' by existing licensees and newcomers alike is not by 'reasoned decision-making' because [the Commission] has not taken a 'hard look' at the 'salient problem to equitably fostering competition in the context of mutually exclusive applications.'" 50 RR 2d at 1485.

In the *Minneapolis Star and Tribune* case, the Review Board awarded a preference to the newcomer but reduced its weight to "slight", because although the newcomer's application offered "certainty of diversity *at this time*" the continued viability of the preference rested on the "unsupported assumption" that the incumbent's channel would remain unoccupied were the incumbent to be permitted to change channels. *Id.*

5. In the instant case, neither the *Julie P. Miner* nor the *Minneapolis Star and Tribune* cases apply. Shoblom is not an existing licensee attempting to upgrade its existing AM station. There is no uncertainty as to whether a grant of Hassayampa's application would improve diversification of ownership of the media in Wickenburg. A grant to Hassayampa would not leave a vacant channel for which another party could apply and there exists no evidence that Shoblom would discontinue operation of its existing AM station.

6. The other argument advanced by Shoblom is the Commission's policy of encouraging licensees of daytime-only AM stations to add full-time FM broadcast stations. As noted by the Commission in *Amendment of Sections 73.35 and 73.240 of the Commission's Rules Relating to Multiple Ownership of AM and FM Stations*, FCC 82–113, Mimeo No. 30998, release April 20, 1982:

> ". . . an existing AM licensee may presently file an application for a new FM station in a community. If a non-licensee files a mutually exclusive application for that facility, it would have an advantage under the diversification criterion of the standard comparative issue." Page 4, fn. 6.

Such statement does not amount to a policy favoring the grant of FM facilities to existing AM licensees over qualified other applicants.

7. In *Bill Garrett Broadcasting Corp.*, 16 FCC 2d 415 (1969) the Commission held that as between a daytime-only AM and a full-time AM station in the same community, the daytime-only station should be preferred but even here the Commission concluded that the proposal would "have a substantial adverse impact on the diversification of ownership of mass media" but that the proposal to add an FM station to an applicant's existing AM station was no more "substantial" than the other applicant's proposal to increase a regional concentration of control by adding an FM station to its existing holdings of four AM stations, three FM stations and a newspaper in the region. 16 FCC 2d at 420–21.

8. The findings in the instant case show that not only does Shoblom have the existing daytime AM station at Wickenburg but it also has an AM-FM low-power TV combination elsewhere in the region which supports the type of conclusion reached by the Commission in *Bill Garrett Broadcasting Corp., supra.* that Shoblom's application, if granted, would "have a substantial adverse impact on control of the mass medium criterion." *Id.* Unlike the holding in the *Bill Garrett* case, Shoblom's other media interests must be compared to no other media interests of Hassayampa.

9. The second most important criterion specified in the *Policy Statement* is full-time participation in station operation by owners (1 FCC 2d at 395). Mr. Peterson, a 50% general partner of Hassayampa's proposed station proposes to serve at least 40 hours per week as the manager of the station. The other 50% partner, Mr. Watson, does not propose to serve even 20 hours a week at the station. Thus, Hassayampa may be credited with 50% full-time integration of ownership and management. Peterson's integration is qualitatively affected by his past broadcast experience in similar positions and his local residence and civic participation. Shoblom seeks recognition in the comparative process because of his commitment to travel to Wickenburg, his maintenance of a room at his brother's home and history of working at KUUK and other stations. However, Shoblom is not committed on this record to any part-time or full-time integration of ownership and is entitled to no credit for integration. See *Midwest Broadcasting Co.*, 70 FCC 2d 1489 (Rev. Bd. 1979).

10. Where the integration preference is not justified as is the case with Shoblom, any attempt to qualitatively enhance such non-preference also fails. However, where the integration preference is found for one applicant, Hassayampa in this case, the qualitative proposals can be considered. See *Poet's Seat Broadcasting, Inc.*, 78 FCC 2d 1080 (Rev. Bd. 1980).

Where such integration is qualitatively enhanced by civic participation,[4] local residence[4] and past broadcast experience,[4] Hassayampa may be credited with a substantial preference under the integration criterion of the best practical service factor. *Radio Gaithersburg, Inc.*, 72 FCC 2d 821 (Rev. Bd. 1979); *Barnes Enterprises, Inc.*, 69 FCC 2d 1957 (Rev. Bd. 1978) and *Community Broadcasting Service*, 2 FCC 2d 53 (Rev. Bd. 1965).

Final Comparison

11. Hassayampa is entitled to a substantial preference under the diversification of ownership criterion of the standard comparative issue. Hassayampa is also entitled to a substantial preference for its proposed integration of ownership into management and thus receives a substantial preference under the best practicable service criterion. Shoblom is not entitled to any preferences.

12. Accordingly, IT IS ORDERED, that the application of Hassayampa for a new FM station at Wickenburg, Arizona IS GRANTED and the application of Shoblom IS DENIED.[5]

FEDERAL COMMUNICATIONS COMMISSION

Byron E. Harrison
Administrative Law Judge

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[4] *Policy Statement* at 1 FCC 2d 395–96 and *Radio Laredo, Inc.*, 87 FCC 2d 353 (Rev. Bd. 1981).

[5] Under Rule 1.276, appeals (in the form of exceptions to the Initial Decision) must be filed within thirty (30) days of the public release of the full text hereof, unless an extension of time is granted. In the event no exceptions are filed and the Commission has not undertaken to review the Initial Decision during the prescribed 50-day period or taken any of the actions specified in paragraph (c) of Rule 1.276, the Initial Decision becomes effective pursuant to paragraph (c) of Rule 1.276.

Amateur Repeater Stations
Experimental Operation
Interference, Prevention of
Interference, Willful
License, Revocation Grounds For
License, Suspension of

Review Board affirmed ALJ's Initial Decision. Station license revoked and operator's license suspended where amateur operator willfully interfered with communications of other users on repeater frequency. Licensee's explanation of *bona fide* experiments is not an excuse where willful interference was demonstrated, only non-interfering experiments.

-Henry C. Armstrong, III
BC Docket No. 81–826

FCC 83R–16

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of License of HENRY C. ARMSTRONG, III 15640 Lakspur Sylmar, California 91342 Licensee of Station WA6CGI in the Amateur Radio Service	PR DOCKET NO. 81–826
Suspension of License of HENRY C. ARMSTRONG, III 15640 Larkspur Sylmar, California 91342 Amateur Advanced Class Operator License	PR DOCKET NO. 81–827

Appearances

Henry C. Armstrong, III appeared on his own behalf;[1] and *Thomas D. Fitz-Gibbon*, on behalf of the Chief, Private Radio Bureau, Federal Communications Commission.

[1] In the hearing phase of this proceeding, Mr. Armstrong was represented by counsel.

DECISION

Adopted: March 4, 1983; Released March 11, 1983.

BOARD MEMBER JACOBS FOR THE REVIEW BOARD:

1. This proceeding was initiated by an Order to Show Cause and Suspension Order of the Chief, Private Radio Bureau, PR–0188, issued October 21, 1981, directing Henry C. Armstrong, III to show cause why his Amateur radio station license should not be revoked. The Order also suspended Armstrong's Advanced Class Operator license for the remainder of the license term, subject to Armstrong's right to request a hearing. The Order specified issues to determine whether Armstrong's station was operated on December 9, 1980, in violation of the following Amateur Rule prohibitions: Section 97.125 (wilful or malicious interference with any radio communication or signal); Section 97.89(b) (transmission not directed to any receiving apparatus nor to other Amateur station); Section 97.91 (transmission of one-way communications); and Section 97.113 (broadcasting).[2] Issues were also specified to determine whether Armstrong had the requisite qualifications to remain a Commission licensee and whether the suspension order should be affirmed, modified, or dismissed. Armstrong requested a hearing, and Assistant Chief Administrative Law Judge (ALJ) Thomas B. Fitzpatrick presided over the hearing held on February 24 and 25, 1982.

2. In an Initial Decision (I.D.), FCC 82D–59, released August 23, 1982, the ALJ found that Armstrong had violated the specified Amateur rules on December 9, 1980 and that, at hearing, Armstrong had attempted to mislead the Commission as to his true purpose in making the prohibited transmissions. He concluded that the facts of record mandated the revocation of Armstrong's station license and the suspension of his operator license.[3]

3. The proceeding is now before the Review Board on exceptions filed by Armstrong.[4] The Board has reviewed the Initial Decision in light of

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[2] Sections 97.89(b) and 97.91 were amended in non-material ways, effective January 3, 1983, by *Report and Order in PR Docket No. 81–823*, 52 RR 2d 749 (1982). Experimental operations are now called "beacon operations."

[3] Both licenses would otherwise expire on June 9, 1983.

[4] The following related pleadings are also before the Review Board: (a) a motion to strike or, in the alternative, to accept responsive pleading, filed on October 20, 1982, by the Private Radio Bureau; (b) a letter, filed October 25, 1982, by Armstrong; (c) a letter, filed December 6, 1982, by Armstrong; and (d) a motion to strike (c), filed December 17, 1982, by the Private Radio Bureau. The Bureau's October 20 motion will be granted in the alternative. Thus, we will not strike Armstrong's exceptions, but we will accept the Bureau's responsive pleading to these exceptions. The Bureau's December 17 motion to strike Armstrong's letter of December 6, 1982 will be granted and the letter stricken since it is an unauthorized pleading. For the same reason, we will, on our own motion, also strike the October 25, 1982 letter.

these exceptions, the Private Radio Bureau's reply, and our examination of the record.[5] The ALJ's findings of fact are adopted except as modified in this Decision. We also affirm the ALJ's ultimate conclusions that Armstrong's Amateur station license should be revoked and his Amateur operator's license suspended.

4. The evidence of Armstrong's transmissions is not in dispute. On December 9, 1980, Commission engineers monitored the input and output frequencies of the Southern California DX Club repeater, call sign AD6P/R, in response to complaints of interference to the repeater.[6] The engineers heard Armstrong continuously transmitting a computer voice synthesized audio signal that included his call sign, a statement that the station was under computer control, the frequency, and the amount of time the station had been on the air. As a result, the communications of other operators using the repeater were interfered with. I.D., Findings, paras. 5, 6, 7. To the limited extent that the interference resulting from Armstrong's transmissions did not totally override all other signals, other Amateur stations could be heard talking with one another. *Id.*, para. 7. The voice synthesized transmissions did not address anyone in particular nor did the other stations using the frequency respond to them. *Id.*

5. While Armstrong acknowledged that the transmissions were his, he argued at hearing that he was conducting permissible experimental testing related to the development of a computer program (RAMAR) with which a human voice could communicate by radio, telephone, or other electronic means. I.D., Findings, paras. 14, 19, 46; see Section 97.89(b) of the Rules. Armstrong's technical credentials for such testing are an electrical engineering degree and training in computer design and hardware and software development. I.D., Findings, para. 11. He further claimed that before he began his transmissions, he checked to make sure that the frequency on which he was going to transmit was clear. *Id.*, para. 20.[7] He also claimed that he continually monitored the radio frequency during the entire time of his transmissions and did not hear any other stations. *Id.* Armstrong stated that he conducted the tests as frequently as possible and normally stayed on the air for seven or eight hours at a time. *Id.*, para. 21.

6. Evidence casting doubt on the *bona fides* of Armstrong's explanation was presented by Amateur operators Richard N. Reimer and Don E. Jones. Reimer is a member of the Southern California DX Club and the

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[5] Oral argument was not requested by either of the parties.

[6] A repeater is a licensed station which receives the signals of other Amateur radio stations on one frequency and retransmits them automatically on another frequency, enabling low-power stations to cover a wider area.

[7] Armstrong was transmitting on 144.8863 MHz, near enough to the repeater input frequency of 144.88 MHz to be picked up and retransmitted because of the bandwidth of the repeater receiver. I.D., Findings, para. 26. The repeater output frequency was 145.48 MHz.

technical custodian of the club repeater. I.D., Findings, para. 34. He stated that he had heard Armstrong on the repeater at least 100 times prior to December 9, had discussed over the air with Armstrong the interference problems caused by operating too close to the repeater input frequency, and had offered to buy Armstrong new crystals that would operate on a different frequency in order to eliminate the problem. *Id.*, para. 35. Reimer also testified that Armstrong had threatened over the air that he was going to make the repeater useless and was going to put his station under computer control as an improved method of driving the repeater off the air, and that Armstrong previously had transmitted a ticking clock over the air for long periods of time and had tied up the repeater by engaging in lengthy monologues about anything and everything. *Id.*, paras. 35, 36. Jones, a former member of the Southern California DX Club, who was using the repeater during the period monitored by the Commission engineers, testified that he thought Armstrong's transmissions were the implementation of a threat he had heard Armstrong make a few months earlier to shut down the Southern California DX Club repeater. *Id.*, para. 38. In response, Armstrong denied the allegations that he had threatened to drive the repeater off the air but acknowledged that he had received complaints of interference and had had a series of rows with the Southern California DX Club. *Id.*, paras. 40–42. The ALJ credited the testimony of Reimer and Jones, rejected Armstrong's contentions that he was engaged in legitimate experimental one-way transmissions, and concluded that Armstrong's "cover story" of experimental testing was only a subterfuge to disguise his campaign to drive the Southern California DX Club repeater off the air by causing interference to it. He used the findings of wilful interference and subterfuge as grounds for revoking Armstrong's station license and suspending his operator license. I.D., Conclusions, paras. 5, 7, 8, 10.

7. In his exceptions, Armstrong challenges the ALJ's ultimate findings and conclusions, claiming that the ALJ did not allow him to put into evidence either his station logs or a showing (apparently a videotape) that his computer program was operational for at least eight months before the DX Club repeater went on the air. He argues that this evidence would absolve him of any wrongdoing.

8. Armstrong's exceptions are without merit. As correctly noted by the Bureau, Armstrong makes no reference to any point in the hearing transcript where his station logs were offered into evidence, nor does it appear from our review of the record that he ever attempted to offer the logs into evidence. Thus, this exception is rejected as a belated and unsupported attempt to introduce new evidence into this proceeding, rather than a challenge to an actual ruling by the ALJ. *See The News-Sun Broadcasting Co.*, 27 FCC 2d 61, 62, 20 RR 2d 1084, 1085 (1971). As to the videotape, the ALJ properly denied its admission into evidence on the

ground that the record already contained ample evidence concerning the nature and operation of Armstrong's computer system. The videotape was described as a moving picture showing Armstrong's equipment and explaining its functions and capabilities (Tr. 367), and there was no indication when it was offered that it would add anything not already contained in the record. In any event, we do not see how this information could be exculpatory. The essential issue in this proceeding is whether Armstrong wilfully interfered with other radio communications on December 9, 1980, in violation of Section 97.125, not whether he may also have been conducting *bona fide* experiments, a question we need not and do not reach. Even if his experiments were *bona fide*, this would not justify or excuse the extensive and wilful interference demonstrated on this record, for Section 97.89(b) sanctions only non-interfering *bona fide* experiments.[8] We believe the record evidence plainly shows that Armstrong did violate Section 97.125. See paragraph 4, *supra*. As for his intentions, it is uncontroverted that Armstrong was aware that the Southern California DX Club was operating a repeater on or near his transmitting frequency and yet he took no steps to monitor the output frequency of the repeater before or during his transmissions to determine whether he was causing interference, despite having been warned previously that his earlier transmissions had caused serious interference to other Amateur operators.[9] And there is also the testimony of the other Amateur operators, credited by the ALJ, that Armstrong had threatened to render the repeater useless by means of his computer operation.

9. Although Amateur frequencies may be used for experimentation and repeater operation without specific assignment for those purposes, the frequencies must be shared among all Amateur operators. Once Armstrong had been alerted that there was an interference problem between the operation of his system and the repeater, it was incumbent on him at least to seek same way to resolve the interference. Armstrong made no effort to do so. Rather, with total disregard to others who also had a right to use the frequency, he deliberately monopolized the frequency for prolonged periods of time causing interference to anyone who sought to use the repeater station. Such wilful interference cannot be tolerated. The Commission has previously indicated that even a single transmission may be the basis for license revocation if the misconduct

[8] *See Report and Order in PR Docket No. 81–823, supra*, at 751, in which the Commission stated that it will not stand idle when "malicious" or "illegally-caused" interference occurs and authorized its Engineers-in-Charge at field facilities to order the cessation of amateur experimental operations where "the station is operating improperly or causing undue interference."

[9] James R. Zoulek, Assistant Engineer-in-Charge of the Commission's Long Beach District Office, testified that the proper procedure to follow when operating near a repeater input frequency is to monitor both the input and output frequencies before transmitting. I.D., Findings, paras. 4, 31. Armstrong did not do this.

involved is sufficiently serious. *Raymond C. Standring*, 68 FCC 2d 1021, 42 RR 2d 1589 (1978). In *Donald E. Gilbeau*, 91 FCC 2d 98 (Rev. Bd. 1982), we held that wilful interference is misconduct of this nature and revoked a station license for a single instance of jamming, notwithstanding the mitigating circumstances of contrition and a prior record of good service.[10] Where, as here, no contrition is present, or other independent evidence of mitigation, the record warrants no lesser sanction. *See Kenneth L. Gilbert*, 52 RR 2d 965 (Rev. Bd. 1982); *Gary W. Kerr*, 91 FCC 2d 107 (Rev. Bd. 1982).[11] In light of our holding that Armstrong's transmissions in violation of Sections 97.125, 97.91 and 97.113 require revocation and suspension of his licenses, it is unnecessary to review the ALJ's further finding that Armstrong was also attempting to deceive the Commission with his experimentation "cover story".

10. ACCORDINGLY, IT IS ORDERED, That the license of Henry C. Armstrong, III for Radio Station WA6CGI in the Amateur Radio Service IS REVOKED and his Amateur Advanced Class Operator license IS SUSPENDED for the remainder of the license term; and

11. IT IS FURTHER ORDERED, That the motion to strike or, in the alternative, to accept responsive pleading filed October 20, 1982, by the Private Radio Bureau IS GRANTED to the extent that the responsive pleading IS ACCEPTED; and

12. IT IS FURTHER ORDERED, That the motion to strike filed by the Private Radio Bureau on December 17, 1982, IS GRANTED, and Armstrong's letters filed October 25 and December 6, 1982, ARE STRICKEN.

FEDERAL COMMUNICATIONS COMMISSION

Jerold L. Jacobs
Member, Review Board

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[10] Because of the mitigating circumstances, however, our revocation in *Gilbeau* was expressly conditioned as being *without prejudice* to the licensee's refiling an application after the required one year waiting period following revocation.

[11] While the violation of Section 97.125 is sufficient grounds for revocation, there is no specific exception to the ALJ's conclusion that the violations of Sections 97.91 and 97.113 were also proved, and we agree with this assessment.

NOTE: Pursuant to Section 1.104 of the Rules, 47 CFR §1.104, the revocation and suspension ordered herein become effective 40 days after the release date of this Decision, unless an application for review or petition for reconsideration is filed within 30 days, in which case the effective date will be suspended pending further order of the Board or the Commission. Immediately upon the effective date of this Decision, the licensee shall forward to the Commission the licenses revoked and suspended. Operation of the Amateur Radio Station herein after the effective date will be in violation of Section 301 of the Communications Act of 1934, as amended, and will subject any person in violation to the penal sanctions specified in Section 501 of the Communications Act. A copy of this Decision shall be served by Certified Mail, Return Receipt Requested on Henry C. Armstrong, III at his last known address, 15640 Larkspur, Sylmar, California 91342.

FCC 82D–59

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of License of HENRY C. ARMSTRONG, III 15640 Larkspur Sylmar, California 91342 Licensee of Station WA6CGI in the Amateur Radio Service	PR DOCKET NO. 81–826
Suspension of License of HENRY C. ARMSTRONG, III 15640 Larkspur Sylmar, California 91342 Amateur Advanced Class Operator License	PR DOCKET NO. 81–827

Appearances

Timothy R. Cappel on behalf of Henry C. Armstrong, III and *T. Todd Hodgdon* on behalf of the Chief, Private Radio Bureau, Federal Communications Commission

INITIAL DECISION
ASSISTANT CHIEF ADMINISTRATIVE LAW JUDGE THOMAS B. FITZPATRICK

Issued: August 18, 1982; Released: August 23, 1982

PRELIMINARY STATEMENT

1. Henry C. Armstrong, III (Armstrong) is the licensee of Station WA6CGI in the Amateur Radio Service. He holds an Advanced Class Amateur Operator License. Both licenses expire on June 9, 1983.

2. On October 21, 1981, the Chief, Private Radio Bureau (Bureau), pursuant to delegated authority, issued an *Order To Show Cause and Suspension Order (Order)* alleging that, on December 9, 1980, Armstrong violated certain of the Commission's Amateur Rules. The *Order* required Armstrong to show cause why his station license should not be revoked and suspended his operator license for its term.[1] The following issues were specified for determination:

(a) To determine whether there were transmissions on December 8, 1980, in wilful violation of Rule 97.125.

(b) To determine whether there were transmissions on December 9, 1980, in wilful violation of Rules 97.89(b), 97.91, and 97.113.

(c) To determine whether Armstrong has the requisite qualifications to be a Commission licensee in the Amateur Radio Service.

(d) To determine whether, in light of the evidence adduced under issues (a), (b), and (c), Armstrong's license for Amateur Station WA6CGI should be revoked.

(e) To determine whether the suspension order should be affirmed, modified, or dismissed.

3. Pursuant to an *Order* (FCC 81M–4058), released December 23, 1981, the prehearing conference was held on February 24, 1982, and the hearing was held on February 24 and 25, 1982. The record was closed by *Order* (FCC 82M–1600), released May 20, 1982. Proposed Findings of Fact and Conclusions of Law were filed by the Bureau and Armstrong on May 28, 1982 and Replies on June 11, 1982.

A. *The December 9, 1980 Direction Finding Activities of the FCC Engineers*

4. James R. Zoulek (Zoulek) is the Assistant Engineer-In-Charge of the Commission's Long Beach District Office (TR 15, 16). He has been employed by the Commission for 15 years as an electronics engineer, all at the Long Beach Office, and participated in 300 to 400 direction-finding (DF) investigations prior to December 9, 1980 (TR 16, 17). Daniel V. Bosque (Bosque), also an electronics engineer in the Long Beach Office, has been working for the FCC for seven years and, prior to December 9, participated in about 100 direction-finding missions (TR 125–127).

5. On December 9, 1980, Zoulek and Bosque in one car, along with Engineers George Anderson Bennett (Bennett) and James Michael La-Fontaine (LaFontaine) in another car, went on a direction-finding mission as the result of complaints received from amateur operators concerning

[1] The *Order* provided that the suspension would be held in abeyance if Armstrong requested a hearing or submitted a station for consideration.

the operations of Henry C. Armstrong,[2] and other amateur operators and instructions from Washington to investigate interference on the two-meter band (TR 18–19, 92–93, 97, 131, 147). The FCC had received letters complaining of interference to the Southern California DX Club repeater, call Sign AD6P/R. The input frequency of the repeater is 144.88 MHz and the output is 145.48 MHz. A repeater receives transmissions on its input frequency and repeats the transmission on its output frequency. This enables a low-power station to cover a wider area (TR 20–21, 92–93).

6. The engineers began monitoring both the input and the output of the repeater at about 7:04 p.m. (TR 21, 54). On the output frequency (145.48 MHz) they heard other stations talking to each other and a computer voice synthesized audio transmission which included Armstrong's call sign, WA6CGI, and which stated that the station was under computer control (TR 19, 21–22, 135). They located the signal which was transmitting the WA6CGI call sign on 144.8863 MHz and began a direction-finding operation and taping of that signal at about 7:08 p.m. (TR 22–23, 53–54, 134, 152). At about 7:45 p.m. they also began taping the output (145.48 MHz) frequency of the repeater (TR 23, 26, 55). They continued taping until 8:24 p.m. (TR 27). The engineers, using the FCC direction-finding equipment, positively determined that the signal which they were taping and monitoring on 144.8863 MHz was emanating from an antenna at the residence of Henry C. Armstrong III located at 15640 Larkspur, Sylmar, California (TR 10, 55).

7. In addition to the transmission of Armstrong's call sign by synthesized voice, the elapsed time of the transmission was also stated during part of the time the Armstrong transmissions were monitored (Bureau Exh. 1; TR 26, 30). The transmissions were not addressed to anyone nor did the engineers hear anyone respond to them (Bureau Exh. 1; TR 60). The transmissions did, however, interfere with the communications of other operators using the repeater (Bureau Exh. 1; TR 22, 28–29, 56–59, 75, 78–80, 84–85, 135, 155–158, 164–165). At one time, Armstrong stopped transmitting for a few minutes and other amateurs could be heard talking on the repeater. Armstrong began transmitting again while those conversations were still in progress (Bureau Exh. 1; TR 29–30).[3]

8. Armstrong's contention that the transcription of the intercept does not disclose that Armstrong's transmission was interfering with the

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[2] Armstrong is the licensee of Amateur Radio Station WA6CGI and the holder of an Advanced Class Amateur Operator license. These licenses expire on June 9, 1983 (TR 9, 10).

[3] Bosque explained that on 145.48 MHz the Armstrong transmissions were in and out, sometimes being in the background and at other periods of time overriding the other transmissions on 145.48 MHz. When the Armstrong signal and another signal were transmitting at the same time on or near the repeater's input frequency (144.88 MHz) it resulted in "a garbled signal" or "a garbled sound" so that you couldn't tell either signal (TR 155–157). He further explained that Armstrong's signal was the strongest signal heard during their monitoring on 144.8863 MHz, since they were right next to his house (TR 157–158).

transmissions of other stations is rejected. The FCC engineers, Zoulek and Bosque explained that their monitoring established that Armstrong's transmission interfered with operators using the repeater (TR 22, 75, 78–80, 135, 155–158). Moreover, as detailed, *infra*, Don Jones, licensee of Amateur Radio Station N6ZV and the licensee KJ6J received interference from the Armstrong transmission on December 9, 1980 (Bureau Exh. 1, pp 18 and 21).

B. *Armstrong's Background and Development of RAMAR*

9. As noted, *supra*, Armstrong is the licensee of Amateur Radio Station WA6CGI and holds an Advanced Class radio operator license. The Amateur radio station is located at 15640 Larkspur, Sylmar, California 91342 (TR 9–10).

10. Armstrong was first issued a license as an Amateur Radio operator by the FCC on July 6, 1963 (TR 264). Thereafter, he participated in a number of volunteer amateur radio groups including the Radio Amateur Civil Emergency Service and the Military Affiliated Radio System to provide emergency communications in time of disaster and backup military communications of an unclassified nature (TR 264–67).

11. Armstrong has a Bachelor of Science degree in electrical engineering from Washington University and has received technical training on computer design and hardware and software development. As part of his current and past employment, Armstrong has been involved in the research and development of computer memory storage, bisynchronous computer controllers for telephone communications, automated radio broadcast stations, specialized radio coded transmitters and fast foyer analysis and linear predictive coding (TR 240–241, 250–252, 258–262, 263).

12. Since 1963, when Armstrong first received his amateur radio license, Armstrong has performed experimentally oriented amateur radio activities. As part of these activities, he has built various equipment and experimented with its development and use through radio transmissions (TR 269–70).

13. Prior to December 9, 1980, Armstrong had never received any notice of violation from the FCC alleging that he had failed to comply with FCC rules and regulations in connection with any of his activities, experimental or otherwise, related to amateur radio operation (TR 268).

14. In the early part of 1977, Armstrong began the development of a computer program identified by him as Radio Activated Multi-Access Routines or RAMAR. Armstrong developed the RAMAR computer program for the purpose of creating a pseudo-intelligent computer program with whom a human could communicate by voice in plain English (TR 248, 270–72).

15. As part of the development of the RAMAR computer program, Armstrong experimented with the use of radio transmission or frequency links to develop the capability to communicate by voice with the RAMAR computer program by radio, telephone or other electronic transmissions. Armstrong began his experimentation with the radio transmission link in connection with the development of the RAMAR computer program in late 1977 (TR 250, 272).

16. In his experimentation with the radio transmission link capability of the RAMAR computer program, Armstrong first developed simulated voice communications with the RAMAR computer program in June of 1978, whereby the computer would generate a simulated voice by the use of the phoneme form of speech. Prior to December 9, 1980, Armstrong was using the radio transmission link to experimentally develop the capability of the RAMAR computer program to communicate with voice simulations. The development of this capability was problematical because of the difficulty in understanding the phoneme form of speech and of achieving speech recognition with a computer in two-way communications through a radio transmission link (TR 250, 273–75).

17. Armstrong utilized the frequency of approximately 144.885 to experimentally develop the simulated voice capability of the RAMAR computer program through radio transmission links (TR 276, 342).

18. He developed a software program to utilize in development of the simulated voice capability of the RAMAR computer program (TR 276). The software program provided a radio station identification by audio and Morse Code and a synthesized voice that was generated by the computer so that he could experiment with the voice clarity over a radio transmission link. The purpose of the radio station identification was to adhere to the rules and regulations of the FCC (TR 277–278, 336).

19. Armstrong claimed that on the afternoon of December 9, 1980, he began conducting experimental testing related to the development of the RAMAR computer program using what he believed to be the radio frequency of 144.885 MHz[4] (TR 107, 309, 407). Specifically, Armstrong was utilizing the software program which he had designed to provide a synthesized voice transmission for the performance of intelligibility experiments on the radio transmission link. The software program provided the required FCC identification for Armstrong's Amateur radio station both in voice and Morse Code identification. Armstrong claimed he was testing the transmission line to resolve an intermittent coaxial cable problem and the near field effect of metal objects on the omni-directional characteristics of his transmitter signal.[5] According to Armstrong, this

[4] As detailed, *infra*, the frequency was measured by the FCC to be radio frequency 144.8863 MHz.

[5] The testing of the efforts of metal objects in the new field was conducted by Armstrong going on the roof and raising and lowering his antenna. He had not been working with the antenna during the 30 minutes just prior to the FCC engineers' inspection (TR 315).

testing was critical to the development of the RAMAR computer program (TR 309–312, 335–336).

20. Armstrong claimed that before he began the experimental testing on radio frequency 144.8863 MHz on December 9, 1980, he checked to make sure that the frequency was free and that on each occasion during the experimental testing when he stopped testing for a period of time and then began again, he listened to the radio frequency and determined that no other transmissions were being made with which he might interfere (TR 313, 348–49). He further claimed that he continually monitored the radio frequency during the entire time that he was conducting the experimental testing for the RAMAR computer program and did not hear any transmissions from any other radio operator (TR 313).

21. Armstrong acknowledged that he conducted his tests as often as time would permit and normally stayed on the air for seven or eight hours at a time (TR 346). While these "tests" were for the purpose of developing his RAMAR program, he did not tell that to the engineers because he did not wish to reveal the results of his research and was afraid some proprietary interest might be disclosed (TR 327–329).

C. *Inspection of Armstrong's Station*

22. At 8:24 p.m., Zoulek and Bosque went to Armstrong's house to conduct an inspection of his station (TR 27–28, 31). At the station, they observed a Radio Shack TRS–80 computer with a voice synthesizer output and several radios, one of which was tuned to the 144.8863 MHz frequency which they had just monitored and was warm to the touch. The speaker for the computer was accoustically coupled to the microphone of the transmitter (TR 31). They also observed an elapsed time clock (TR 52, 140).

23. Armstrong demonstrated the capability of the RAMAR computer program to generate a synthesized voice (TR 31, 110, 140). The equipment included a Radio Shack TRS–80 computer with a voice synthesizer output, an 8–channel frequency equalizer, an ultrasonic command link, a field strength meter, a power and SWR meter, a TS 720 two meter radio and DC band radio (TR 31, 110, 289–300).

24. Armstrong informed the FCC engineers that he had been conducting a number of experiments with the use of radio transmissions including near field radiation tests and intermittent coaxial cable tests. He further informed them that he was trying to improve the intelligibility of the audio coming from the computer to the radio transmitter. As noted, *supra*, he did not inform them that he was also experimenting with the voice simulation capabilities of the RAMAR computer program because, according to Armstrong, he was concerned about his proprietary interest in the RAMAR computer program (TR 32–33, 46, 320, 328–30).

25. Armstrong admitted that the transmissions monitored by the engineers were his and said that he had been testing the temperature rise of his transmitter and the effects of lowering and raising his antenna on the field strength of the station (TR 32–33). He showed the engineers a thermometer about two feet away from the transmitter and a ladder which which he took from the front room of the house to the outside front of the house to demonstrate how he got on the roof to raise and lower his antenna (TR 33–34, 40, 114, 137).[6] Armstrong told the engineers that he had been conducting his "tests" for days at a time and that he had not been transmitting to anyone (TR 38, 115–116).

26. The frequency on which Armstrong's transmitter was set was measured at 144.8863 MHz (TR 88, 106, 122, 153). As noted, *supra*, the repeater input was 144.88 MHz. Because of the band width of the repeater receiver, it was normal that some of Armstrong's transmissions on 144.8863 MHz were picked up on the repeater input frequency (TR 41–42). This resulted in Armstrong interfering with the repeater (TR 41). When Armstrong was advised that his transmissions had been causing interference to the repeater, he stated that he knew there were other people operating on that frequency (TR 30–31, 113–114, 144–145).[7]

27. Armstrong informed the FCC engineers that the computer was controlling the activation of his transmitter. Zoulek and Bosque asked Armstrong how he monitored his tests and he told them that he used a walkie-talkie (TR 36, 162, 326–327). Armstrong denied that he was asked to show them the walkie–talkie (TR 166, 327). Zoulek related that when he asked to see it, Armstrong neither produced it nor asked to leave the room to get it (TR 36, 46, 112–113, 137, 142).[8] The engineers asked him if he had a field strength meter as they did not see one and he stated that he did not (TR 48, 141–142).

28. Zoulek and Bosque maintained that Armstrong did not have his log for that day available (TR 44–45, 146).

29. Armstrong claimed that he was asked where his log books were located, and he informed the FCC engineers that his current log book must be in another room. He further claimed that he asked to leave the room to look for the log book, but was told by the FCC engineers not to do so (TR 324–25).

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[6] The engineers had Armstrong's house in sight from 7:21 p.m. until 8:24 p.m. except for a five minute period when they went for a police back up (TR 27, 100, 132–133). During this time they did not see anyone on the roof of Armstrong's house (TR 35, 40, 133–134).

[7] Zoulek advised Armstrong that he had been causing interference. Armstrong did not acknowledge the he was interfering. However, he was aware that other amateurs operated on the other frequencies (TR 30–31).

[8] Bosque did not recall asking to see the walkie–talkie (TR 142). During the inspection Zoulek informed Armstrong not to leave the room so that he could observe everything the FCC engineers did and also, to be available to answer questions concerning the inspection (TR 317–318).

30. However, both Zoulek and Bosque made clear that Armstrong did not have his log for December 9. Zoulek recounted that he checked Armstrong's "book of logs" and that there was no entry for December 9 (TR 45). Bosque did not observe any notes containing any test data. He emphasized that there were no written documents which he might have concluded were part of a station log "relating to the operations of that evening" (TR 146).[9]

D. *Official Notice of Violation and Armstrong's Response*

31. From the evidence presented to him at the inspection, Zoulek did not believe that Armstrong had been conducting tests (TR 116, 117).[10] Zoulek explained that when one is operating near a repeater input frequency, the proper procedure before transmitting would be to monitor both the input and output frequencies to make sure that one's transmissions do not cause interference (TR 124, 125). Zoulek noted that on December 9, 1980 Armstrong's receiver had the capability of monitoring 145.48 MHz, the output frequency of the repeater (TR 123). However, since his simplex transmitter was tuned to 144.8863 MHz, he was not at the time able to receive or monitor the 145.80 MHz frequency (TR 107). Zoulek denied Armstrong's claim that he knocked Armstrong's microphone off of the table and onto the floor during the inspection (TR 113, 167, 168). Both Zoulek and Bosque denied that they told Armstrong that he was an "experimentally-oriented amateur radio station" (TR 117–119, 159, 160).[11]

32. The engineers completed the inspection and left at 9:20 p.m. (TR 48). As a result of the monitoring and inspection, Armstrong was sent an Official Notice of Violation on January 7, 1981 (Joint Exh. 1; TR 11, 105). Armstrong was cited for the following rule violations: Section 97.89(b) (transmissions not directed to any receiving apparatus nor to other amateur station); Section 97.91 (transmission of one-way communications); Section 97.103 (failure to maintain a station log); Section 97.113 (broadcasting), and Section 97.125 (knowingly caused interference to ongoing radio communications).

33. On January 14, 1981, the Long Beach office received Armstrong's response to the violation notice (Joint Exh. 2; TR 13, 14). In his response, Armstrong reiterated that on the night in question he had been testing

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[9] Armstrong explained that he was not rattled by the appearance of the FCC engineers and that the had told Zoulek that the log for the current day was in another room (TR 418).

[10] The contention that Zoulek was not qualified to express such an opinion is rejected. It was counsel for Armstrong who elicited this testimony and he can not be heard to urge its rejection (TR 116–117).

[11] Armstrong claimed that such a statement was made. Both Bosque and Zoulek denied that they made the statement (TR 117, 159). Bosque explained that Armstrong had "quite a bit of computer equipment" and in a friendly manner one of them might have remarked that "it looks like your into computers" (TR 160).

the effects of raising and lowering his antenna in relation to other metallic objects on the roof. He said that he had been using a walkie–talkie, a S.W.R./power meter, a portable field strength meter and a ladder which was placed against the side of his house by the front door to conduct his tests. He said that his log books had been in plain sight during the inspection. Armstrong stated that he had monitored the frequency for several minutes before transmitting and that if he had caused interference it was an accident. He said that he would be more careful in the future. He alleged that the members of the Long Beach office were biased against him as the result of their friendship with the Southern California DX Club. He further accused Zoulek of knocking over his microphone and damaging it and said that Zoulek and the other engineers had remarked "it is obvious that you are an experimentally orriented (sic) amateur radio station . . .". Armstrong attached to his response a copy of the specially written computer program to perform the identification of his transmitter. He explained that the program allowed him to conduct experimentation with voice synthesizer intelligibility over an AM radio circuit, that he did not knowingly cause interference to any other operator. Lastly, he requested a visit by an FCC representative from the Washington office to review his activities and discuss with him the experimentation that he was conducting (Joint Exh. 2).

E. *Testimony of Richard N. Reimer*

34. Richard N. Reimer is the licensee of Amateur radio Station W6ET and has an Extra Class Amateur Operator license. He is a member of the Southern California Dx Club which is a social organization for people to get together who are interested in long distance amateur communications (TR 192). The club erected its repeater in 1978 on frequencies assigned it by a volunteer frequency coordinating committee and uses it to pass Dx (long distance communication) information (TR 192, 193). Reimer has been the technical custodian of the repeater from the fall of 1978 to the present (TR 193, 221). One does not have to be a member of the Dx Club to use the repeater (TR 193).

35. As technical custodian, Reimer monitored the repeater a great deal between 1978 and December 9, 1980 (TR 194–195). As a conservative estimate, he heard Armstrong on the repeater at least 100 times beginning with the repeater's first few weeks of operation (TR 195, 199, 200–201). Reimer attempted to discuss with Armstrong the interference problems caused by Armstrong's operating simplex on or near to the repeater input frequency. Although Armstrong indicated that he realized that he was causing interference, he told Reimer that he was going to continue operating simplex on that frequency[12] (TR 201, 203–205). In an

[12] A simplex operation is when you transmit and receive on the same frequency (TR 202). Reimer explained that an amateur normally listens on the frequency before he transmits and if he is listening on the frequency on which he is transmitting, he could not tell if the repeater was in operation because he couldn't hear the output (TR 202).

attempt to solve the problem, Reimer had offered to buy new crystals for Armstrong's radio but Armstrong did not take him up on the offer (TR 234–236).[13] In the enusing months until December 9, Armstrong many times over the air said that "he was going to drive the repeater off-make it useless" (TR 205, 206). Near the end of that time frame, Reimer heard a synthesized voice which identified as WA6CGI and a ticking clock which would just tick over the air for long periods of time (TR 206, 207). Reimer also heard Armstrong say that he was going to put his station under computer control as an improved method of driving the repeater off of the air (TR 207, 231–233).

36. Reimer recalled that Armstrong, on the air, said that he was going to use the computer simulation as a "tactic" to put the repeater off the air (TR 231–232). Reimer explained that for eighteen months prior to December 9, 1980 Armstrong had been putting in a great number of hours "live" causing interference to the repeater by engaging in lengthy discussions "about anything, everything" to tie up the channel. On these occasions, which Remier estimated at approximately 100, Armstrong was not in two-way communication (TR 232–233).

37. Reimer expressed the opinion that it was not necessary for Armstrong to use the repeater input frequency (144.88 MHz) or 144.885 MHz or 144.8863 MHz to conduct the tests he told the engineers that he was conducting on December 9 (TR 209).

F. *Testimony of Don Jones*

38. Don Jones is the licensee of Amateur radio Station N6ZV and holds an Amateur Extra Class Operator license (TR 169, 170). He was a member of the Southern California Dx Club and using the repeater on December 9, 1980, when he heard Armstrong's transmissions on the output of the repeater (TR 170, 172). He was receiving it on 145.48 MHz, the repeater's output frequency (TR 172). At one point he complained about the interference Armstrong was causing. He recalled that on several occasions that day Armstrong interfered with communications being transmitted through the repeater (Bureau Exh. 1, pages 18 and 21; TR 172–174).[14] Another licensee, KB6BG, tried to break through the interference caused by Armstrong's transmission. However, his signal was not strong enough to be intelligible (TR 173–174). At the time of the hearing Jones was no longer a member of the club, but he had encountered no problems in using the repeater in that status and had never heard anyone denied access to it (TR 177, 178). Jones believed that Armstrong's trans-

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[13] Armstrong claimed that this offer was made after December 9, 1980 (TR 360).

[14] Jones explained that Armstrong's transmission was a distraction and interfered with the transmission by a licensee, KJ6J; he further explained that when no one was transmitting on the repeater, Armstrong's transmission "was being heard everywhere" (TR 173).

missions, which he characterized as "broadcasting to no one," were a carrying out of a threat which he had heard Armstrong announce on the air four or five months prior to December 9 that Armstrong was going to "shut down the Southern California Dx Club repeater" (TR 179, 180, 184).

G. *Armstrong's Relationship With the Southern California DX Club*

39. The FCC does not publish an official list of radio frequencies being used by repeaters, and there is no indication of the radio frequencies on which repeaters are being operated. The FCC does not assign radio frequencies to repeaters. Repeaters must share the radio frequency upon which they operate with any other Amateur radio operator and have no right to monopolize a particular frequency (TR 61–62, 151–152). Radio transmissions for experimental purposes may be properly made on radio frequencies used by repeaters so long as interference is not caused.

40. Armstrong denied that he threatened to drive the California DX Club repeater off the air. He did admit that he had indicated that he was going to acquaint the rest of the amateur community with the fact that the Southern California DX Club was trying to drive non-members away from the frequency (TR 340, 341). He recounted an incident when he had been in the middle of a conversation "the very first minute" that the repeater came on the air and that he had not been able to complete the conversation (TR 343, 344). He claimed that from then on whenever he got on the radio, although the "repeater would be quiet, not a peep heard out of it for several hours," people would start interfering with him (TR 344, 345). Because of this jamming, Armstrong had increased his power a few weeks before December 9 (TR 345, 346, 353).

41. Armstrong acknowledged that prior to December 9, 1980 he had been told by members of the Southern California DX Club to stop transmitting on radio frequency 144.885 MHz because the Club was operating a repeater (TR 342–43, 344–345). He claimed that members of the Southern California DX Club continually threatened and abused him and interfered with his experimental radio transmissions in an effort to prevent him from using radio frequency 144.885 MHz (TR 344–345). Armstrong specifically denied that any member of the Southern California DX Club ever offered to share radio frequency 144.885 MHz with him, although he requested that they do so (TR 341–342).

42. Although Armstrong received complaints as early as 1978 that his signal was interfering with the repeater, he ever bothered to find out whether he was or not (TR 398–401). The reason, according to Armstrong, that he did not check if he was causing interference was that it would have required him to purchase new crystals (TR 398, 401).[15]

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[15] He claimed he was unemployed and did not have the $160 to purchase new crystals for his radios (TR 360–363). However, it is noted that William Morgan, President and Chief Operating Officer of Spectra Data, testified that he had employed Armstrong 90% of the time from 1976 to December 1980 or had farmed him out to other companies (TR 240–248).

43. Armstrong maintained that he went to great lengths to try to avoid interfering with the repeater (TR 406, 407). When the repeater input frequency was 144.890 MHz for about two months in 1978, he moved his signal down to 144.843 MHz (TR 408). The repeater club changed the input frequency to 144.880 MHz in late 1978 or early 1979. He moved his frequency to 144.8863 MHz in November of 1980 (TR 407–409). Despite this, he still received complaints of interference and concluded that he was not, in fact, interfering with the repeater and that the complainants were just making that up (TR 407, 410).[16]

44. Armstrong admitted that prior to getting his voice synthesizer, he had a ticking clock which generated a repeating, predicting pulse over the air (TR 424, 425). He adjusted the synthesized voice transmissions by using an eight channel frequency equalizer and listening to the transmissions on his walkie–talkie (TR 425, 426). He maintained that he was continually being jammed but that he never went out of his way to interfere with anyone or out of his way to confirm or refute the complaints about his transmissions (TR 426, 427).

45. Sometime in mid–1980 he acquired a transceiver which had the ability to monitor the repeater's output frequency (TR 399, 401, 423). Although he had received complaints that he was interfering with the repeater and he now had the ability to monitor the repeater's output frequency, he did not monitor the repeater output frequency before transmitting on December 9, 1980 (TR 399, 400).[17]

H. *Armstrong Ceased "Experiments" After December 9, 1980*

46. After the investigation conducted by the FCC engineers on December 9, 1980, Armstrong immediately ceased conducting all experimental activities through the use of radio transmissions in connection with the development of the RAMAR computer program or in any other regard in a show of good faith (TR 364). Armstrong maintained that on December 9, 1980, and at all times prior thereto, that he believed that he was conducting valid and proper experimental activities that were authorized under the rules and regulations of the FCC (TR 364).

Ultimate Findings and Conclusions

1. Henry C. Armstrong, III (Armstrong) is the licensee of Amateur Radio Station WA6CGI and the holder of an Amateur Advanced Class Operator licensee.[18] The issues in this proceeding seek to determine

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[16] According to Armstrong, after a year of receiving death threats from members of the Southern California DX Club, he was unable to believe anything they told him (TR 410).

[17] Armstrong's standard practice was to listen to the frequency on which he was going to transmit before he started (TR 411).

[18] These licenses expire on June 9, 1983.

whether Armstrong on December 9, 1980 operated Amateur Radio Station WA6CGI in violation of 47 C.F.R. 97 .125 in that he wilfully and maliciously interfered with or caused interference to radio communications or signals. The issues also seek to determine whether on December 9, 1980 Armstrong operated Station WA6CGI in violation of 47 C.F.R. 97.89(b) in that his transmissions were not directed to any receiving apparatus nor to any other Amateur station; 47 C.F.R. 97.91 in that his transmissions constituted one-way communications and 47 C.F.R.97.113 in that it represented broadcasting. Ultimately, it must be determined whether Armstrong has the requisite qualifications to be licensee in the Amateur Radio Service.

2. The findings establish that Armstrong, an experienced Amateur operator, possesses the educational and technical background and the requisite knowledge and skill to conduct experimentally oriented Amateur radio activities. Armstrong's efforts to develop a computer program identified as Radio Activated Multi-Access Routines (RAMAR) for the purpose of creating a psuedo-intelligent computer program with whom a human could communicate by voice in plain English is fully detailed in the findings, as is his utilization of radio transmissions as part of the development of the RAMAR computer program.

3. It is undisputed that Armstrong transmitted on the frequency 144.8863 MHz on December 9, 1980. It is Armstrong's contention that, on that date, as part of his development of the RAMAR computer program, he was properly conducting legitimate experimental activities within the provisions of the Commission's Rules. For the reasons set forth, *supra*, this contention is rejected, and it is ruled that the Bureau has sustained its burden of establishing that Armstrong wilfully interfered with the radio transmissions of the members of the Southern California DX Club on December 9, 1980. As detailed in the findings, Armstrong, on that date, was transmitting on the frequency 144.8863 MHz. The input frequency for the Southern California DX Club repeater was 144.88 MHz and its output frequency was 145.480 MHz. Armstrong's transmissions on 144.8863 MHz were picked up by the input 144.88 MHz frequency of the repeater, and interfered with the communications of operators using the repeater. The record establishes that Armstrong was well aware of what he was doing and the consequences of his actions.

4. Armstrong's contention that the Bureau's Intercept fails to establish interference from Armstrong's transmission is rejected. The Intercept itself establishes that Club members transmitting on 144.88 MHz received interference from Armstrong. Additionally, the testimony of FCC engineers Zoulek and Bosque and the and the testimony of Don Jones establish that such interference was caused on December 9, 1980.[19]

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[19] Interference is conduct reasonably calculated to interfere with the normal transmission of a radio signal. *Stephen A. Wichrowski, Jr.*, 15 FCC 2d 754 (Rev. Bd. 1968).

5. The Presiding Judge agrees with the Bureau that the totality of the evidence establishes that Armstrong's transmissions had as their purpose to cause interference to members of the Southern California DX Club rather than the purpose of engaging in legitimate tests or experimentation. The testimony of Don Jones and Richard Reimer is fully credited and it is found that Armstrong was well aware that he had been causing interference to the Club repeater. He had threatened on a number of occasions to continue to cause such interference until the Club was driven off the 144.88 MHz input frequency. Armstrong is found to have specifically threatened to put his station on computer control, as part of his campaign to drive the Club's repeater off the frequency 144.88 MHz. The record establishes that Armstrong's "tests" were merely a cover for his campaign to deliberately and maliciously interfere with the DX Club repeater.

6. The contention of Armstrong that there was no evidence introduced that Armstrong knew that his experimental activities were interfering with the operation of the repeater is rejected. The testimony of Reimer and Jones clearly refutes this. Admittedly, none of Armstrong's radios were tuned to frequency 145.48 MHz, the output frequency of the repeater, on December 9, 1980. However, this was by choice. He had the capability of monitoring the repeater output frequency and he chose not to do so. Armstrong limited his monitoring to the frequency 144.8863 MHz and he never bothered to monitor the output frequency of the repeater, even though he, as an experienced Amateur operator with exceptional technical knowledge, must have recognized that this would have been the proper procedure to follow. It is found that he intentionally made every effort to cloak himself in ignorance. Armstrong, because of his background and skill, had to have been aware that he was operating on the frequency next to the input frequency of the repeater, with the result that his transmission would be picked up by the repeater and retransmitted on the output frequency, thus causing interference. Certainly, he had been told often enough by Club members that he was causing interference by his operations. Despite this he engaged in one-way transmissions for hours and days at a time with the knowledge that his transmissions were being picked up by the repeater, thus rendering it useless for hours and days at a time.

7. The Presiding Judge agrees with the Bureau that Armstrong's "cover story" that he was engaging in legitimate testing was only a subterfuge to disguise his campaign to drive the Southern California DX Club repeater off the air by causing interference to it. This wilful interference, standing alone, mandates revocation of the station license and suspension of his Amateur operator license. His attempt at subterfuge, continued through the hearing process, is another basis for finding Armstrong lacking in the requisite qualifications to be Commission licensee in the Amateur Radio Service.

8. For the reasons set forth, *supra*, the argument made that Armstrong was engaging in legitimate experimental one-way radio transmission is rejected. Additionally, the contention that the fact that Armstrong identified his station contradicts the claim that he wilfully interfered is also rejected. His action in identifying his station evidences the arrogant approach that he took in his determined campaign to force the repeater club off the 144.48 MHz frequency. Armstrong failed to show that it was necessary for him to conduct the purported experiments for hours and days at a time.[20] The record establishes that his ulterior motive was to force the Radio Club off of the frequency 144.88 MHz.

9. It has been ruled that Armstrong was not transmitting on December 9, 1980 for legitimate experimental purposes. It follows that he was not operating in accordance with 47 C.F.R. 97.89(b), which permits such operation. It is undisputed that Armstrong was not transmitting to any other Amateur operator. It is, therefore, concluded that the Transmission was one-way and violative of 47 C.F.R. 97.91 and also constituted broadcasting in violation of 47 C.F.R. 97.113.[21]

10. In summary, it is concluded that on December 9, 1980 Armstrong wilfully and maliciously interfered with radio communications in violation of 47 C.F.R. 97.125 and that he attempted to mislead this Commission as to his true purpose in conducting the transmissions in question. Additionally, as noted, *supra*, he violated 47 C.F.R. 97.89(b), 97.91 and 97.113. The facts mandate the revocation of the station license and the suspension of Armstrong's Amateur operating license.

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party or the Commission reviews this Initial Decision on its own motion, in accordance with the provisions of 47 C.F.R. 1.276, the Amateur Radio Station license WA6CGI, licensed to Henry C. Armstrong, III, IS REVOKED and the Amateur Advanced Class Operator license of Henry C. Armstrong, III IS SUSPENDED for the remainder of its term.[22]

FEDERAL COMMUNICATIONS COMMISSION

Thomas B. Fitzpatrick
Assistant Chief Administrative Law Judge

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[20] While 47 C.F.R. 97.89 permits transmissions for experimental purposes, it does not authorize the licensee to cause interference to transmissions by other Amateur operators.

[21] The Official Notice of Violation cited Armstrong for violating 47 C.F.R. 97.103, failure to maintain a station log. However, the *Order* did not include an issue as to this violation. As a result, it is unnecessary to consider this matter in resolving the case.

[22] The Secretary is directed to serve a copy of this Initial Decision by Certified Mail, Return Receipt Requested, on the respondent at the address listed in the caption. In the event exceptions are not

Application, Amendment of, Substantial Changes
Ownership and Management, Integration of

In hearing matter of mutually exclusive applications for AM and FM stations, the Review Board granted the FM application of the applicant ranked first comparatively, and the AM application of the applicant ranked second. The Board's Decision turned on the integration criterion.

-Merrickmack Valley B/cing, Inc.
BC Docket No. 80–28

FCC 82R–71

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
MERRIMACK VALLEY BROADCASTING, INC. Nashua, New Hampshire	BC DOCKET NO. 80–28 File No. BP–21, 101
	BC DOCKET NO. 80–29 File No. BPH–10, 926
SUNRISE BROADCASTING CORP. Nashua, New Hampshire	BC DOCKET NO. 80–30 File No. BP–21, 102
	BC DOCKET NO. 80–31 File No. BPH–10, 925
Mario DiCarlo, Norman M. Kruglak, Augusta Hornblower and Ada Harkaway A Limited Partnership d/b/a GATEWAY BROADCASTING ASSOCIATES Nashua, New Hampshire	BC Docket No. 80–32 File No. BP–21, 103
	BC DOCKET

NO. 80–33
File No.
BPH–10,928

COMMUNITY SERVICE BROADCASTING OF NASHUA, INC.
Nashua, New Hampshire

BC DOCKET
NO. 80–35
File No.
BPH–10,927

For Construction Permits for new AM and/or FM Stations to Replace the Deleted Facilities of Stations WOTW (900 kHz, 1kW, D) and WOTW–FM (106.3 MHz, Channel No. 292), Nashua, New Hampshire

Appearances

James K. Edmundson and *Gerald P. McCartin* on behalf of Merrimack Valley Broadcasting, Inc.; *Stanley S. Neustadt, Robert B. Jacobi,* and *Lawrence N. Cohn* on behalf of Sunrise Broadcasting Corp., *Thomas W. Fletcher* on behalf of Gateway Broadcasting Associates; *Walter Sweeney* and *Raymond J. Kimball* on behalf of Community Service Broadcasting of Nashua, Inc.; and *Charles W. Kelley* and *Joseph A. Belisle* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

Adopted: December 3, 1982; Released: December 8, 1982

BOARD MEMBER BLUMENTHAL FOR THE REVIEW BOARD:

1. In this proceeding, Merrimack Valley Broadcasting, Inc. (Merrimack), Sunrise Broadcasting Corp. (Sunrise), and Gateway Broadcasting Associates (Gateway) seek authority to construct new AM and FM broadcast stations at Nashua, New Hampshire, to replace the deleted facilities of Stations WOTW and WOTW-FM, while Community Service Broadcasting of Nashua, Inc. (Community) has filed an application for the FM facility only. By Hearing Designation Order, 82 FCC 2d 166 (1980), their applications were designated for hearing on various issues, the only one of which still remaining being the standard comparative issue. The Order also permitted evidence under this issue regarding the comparative area and population coverage of the FM engineering proposals to determine whether a preference should accrue to any of the applicants. Administrative Law Judge Thomas B. Fitzpatrick subsequently enlarged the issues to include a Section 1.65 reporting issue against Gateway (FCC

80M–1159, released July 5, 1980) and Sections 1.65 and 73.3514 reporting issues against Sunrise. FCC 80M–1794, released September 24, 1980; FCC 81M–163, released January 21, 1981.

2. In an Initial Decision, FCC 82D–26, released April 19, 1982, the ALJ granted Merrimack's application for the FM station and Sunrise's application for the AM facility. The applicants had agreed that the sequence of grants should be that the best qualified applicant be awarded the FM facility and the next best applicant the AM facility. I.D., n. 129. In reaching his ultimate conclusion, the ALJ primarily based his decision on the integration criterion, ranking Merrimack first and Sunrise second. He also awarded Merrimack, Sunrise, and Gateway a slight preference on diversification, gave Gateway a very slight preference for its comparative FM coverage superiority offset by a slight demerit for a Section 1.65 violation, and assessed slight demerits against Sunrise for Sections 1.65 and 73.3514 violations which were insufficient to change its relative comparative position.

3. This proceeding is now before the Review Board on exceptions filed by Sunrise, Gateway, and Community and limited exceptions filed by Merrimack. The Board has reviewed the Initial Decision in light of the exceptions and briefs, the oral argument held September 22, 1982, and our examination of the record. We adopt the ALJ's findings of fact, except as modified in this Decision, but we reverse certain of his conclusions, particularly his treatment of the applicants' integration proposals, and conclude that a grant of Gateway's FM application and Sunrise's AM application would best serve the public interest, convenience, and necessity.

4. *Integration of Ownership and Management.* Gateway is a limited partnership composed of two general partners and two limited partners, all of whom plan to work full time in management positions with the new facility. The general partners will have complete authority and responsibility for all management functions of the partnership. Mario DiCarlo, the 70% general partner and proposed general manager, is not a local resident, but will commute daily to Nashua if Gateway is successful in obtaining a grant.[1] DiCarlo has broadcast experience of a limited nature. Norman Kruglak, the 10% general partner and proposed general sales manager, is not currently a local resident, but plans to move to Nashua. He has been involved in broadcasting for over 20 years with extensive managerial experience. Sunrise is a corporation comprised of six stockholders, three of whom (70%) plan to devote full time to the proposed facility. All three integrated stockholders are local residents and civically active; one (24%) is female and has some broadcast experience. Mer-

[1] DiCarlo lives approximately 30–40 minutes driving time from Nashua in Newton, Massachusetts. I.D., n.47.

rimack, a corporation with twelve stockholders, proposes to integrate seven of its stockholders (67.95%) full time at the station. All but one (6.41%) of the integrated stockholders are local residents or plan to move to Nashua if Merrimack receives a station, and nearly all have actively participated in Nashua's civic activities. None has broadcast experience and three (23.08%) are female. Community is a corporation with voting and non-voting stock comprised of seven stockholders, three of whom (58% of the voting stock) intend to devote full time, and one (9% of the voting stock) part time to the station. The (43%) of the integrated stockholders are local residents and one has been active in Nashua civic organizations. Each of the fully integrated stockholders has some broadcast experience and one (20%) is female.

5. The ALJ credited Gateway with 80% full-time integration based on the ownership interests of its two general partners and ruled that the limited partners' participation at the station was not relevant in determining integration, citing *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 (1981). Sunrise, Merrimack, and Community were credited with 70%, 67.95%, and 58% full-time integration, respectively. The ALJ disallowed credit to Community for the proposed part-time participation of its 9% stockholder, Martin Nankin, and further diminished its quantitative proposal on the basis of its non-integrated equity ownership (i.e., the non-voting stock), citing *Robert M. Zitter*, 59 FCC 2d 274, 37 RR 2d 299 (Rev. Bd. 1976). He concluded that the qualitative attributes of the Merrimack and Sunrise proposals overcame Gateway's quantitative superiority and ranked them one and two, respectively, under the integration criterion. Merrimack was preferred over Sunrise because it had amassed a greater record of civic participation in local Nashua organizations. Community was ranked last because of its quantitative inferiority. Each of the applicants excepts to the ALJ's analysis. We shall address the exceptions seriatim.

6. Initially, Gateway contends that it is entitled to 100% integration credit, rather than the 80% awarded by the ALJ, because both of its general partners, who have complete voting control over the partnership, will be participating full time at the station in managerial positions. Merrimack, on the other hand, contends that Gateways' integration proposal is impractical, since the partnership agreement fails to specify who will control the partnership's management in the event the two general partners disagree, and is therefore entitled to no integration credit. Alternatively, Merrimack alleges that general partner Kruglak is not an actual and true owner and that therefore Gateway is not entitled to any credit for him. Should the general partners' commitments be given full credit, however, Merrimack argues, the weight should be diminished to reflect the equitable (*i.e.*, 80%) as distinct from the ostensible legal (*i.e.*, 100%), ownership, citing *Robert M. Zitter, supra.*

7. We conclude that Gateway is entitled to 100% quantitative integration credit since that percentage accurately reflects the extent of legal authority and voting power DiCarlo and Kruglak possess to implement station policy decisions. *See Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 585, 51 RR 2d 1478, 1480 (Rev. Bd. 1982) and cases cited therein. *See also Communications Properties, Inc.*, FCC 82R–64, released November 16, 1982.[2] We see no reason to reduce this credit to zero, as urged by Merrimack, on the grounds that the partnership will be incapacitated in the event of disagreement between the general partners. As the ALJ correctly notes, DiCarlo and Kruglak do not anticipate that there will be any serious question that cannot be successfully resolved as to the functional ability of the partnership, I.D., Conclusions, para. 22, and Merrimack has pointed to no evidence that would support a contrary conclusion. Undoubtedly, disagreements will occur, but in the absence of persuasive evidence to demonstrate that such disagreements will paralyze the management functions of the partnership, full quantitative integration credit will be awarded. Nor are we persuaded by Merrimack's contention that Kruglak is not an actual and true owner of Gateway. There is no evidence to show that Gateway's partnership arrangement is a sham. Kruglak testified that he intends to make his capital contribution, pursuant to the partnership agreement, (TR. 1255) and that if Gateway does not obtain a station, he intends to pay his pro rata share of the costs. Tr. 1255–56. Additionally, he is empowered with DiCarlo to manage and control the affairs and business of the partnership. Gateway Exh. 10, p. 6. *Berryville Broadcasting Co.*, 70 FCC 2d 1, 44 RR 2d 1325 (Rev. Bd. 1978), relied on by Merrimack, is inapposite. There, the Board found that two nominal partners were not actual owners entitled to integration credit since they had made no capital contributions and their participation was limited to making suggestions indistinguishable from those commonly made by station employees. Where, as here, strong record evidence shows a principal to be a true and active owner, the Board will not otherwise substitute speculation. Finally, Merrimack's reliance on *Robert M. Zitter, supra*, to diminish Gateway's quantitative integration is misplaced. In *Zitter*, the Board slightly reduced an applicant's integration credit because the applicant's non-voting stockholders were not going to work at the station. The Board's holding was based in large part on *Alvin L. Korngold*, 45 FCC 2d 1, 29 RR 2d 875 (Rev. Bd. 1974) where some

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[2] The ALJ was correct that the acivities at the station by Gateway's limited partners were not relevant in determining basic integration credit since the Gateway partnership agreement provides that they shall not take part in the management of the business. *See Anax Broadcasting, Inc., supra.* In any event, Gateway is entitled to 100% voting control of the applicant entity. He was therefore, accorded a 100% integration credit because of the full time participation of its general partners quite apart from the role of its limited partners. *Cf. Greater Wichita Telecasting, Inc., 90 FCC 2d 1046 (Rev. Bd. 1982) (no customary integration credit for limited partners).*

integration credit had been allowed for the participation of a non-voting stockholder. More recently, however, the Commission has indicated in *Anax Broadcasting, Inc., supra*, that the interests of limited partners are generally inconsequential and not entitled to integration credit since the limited partners are passive investors and have no authority to control the licensee. Hence, the cited reasoning in Zitter has been largely eroded and is not apposite in light of the Commission's recent pronouncement. Gateway's 100% quantitative integration credit will therefore not be reduced. *Cf. Bradley, Hand, and Triplett*, 89 FCC 2d 657 (Rev. Bd. 1982).

8. Sunrise and Community also attack the ALJ's decision to credit fully Merrimack's integration proposal. Specifically, Sunrise questions whether the positions proposed for Merrimack's three female principals are managerial in nature and whether Merrimack will be able to finance these full-time positions. These exceptions are rejected. A review of the duties of each principal as set forth in paras. 41, 57, and 66 of the findings in the Initial Decision, clearly demonstrates that the three female principals who are proposed as minority affairs director, women's affairs director, and community affairs director, will serve in responsible and meaningful managerial positions at the station. There is no evidence to support Sunrise's contention that their duties will merely amount to research and other non-management functions. Moreover, there is no record evidence (or issue) to show that financial considerations will preclude effectuation of Merrimack's proposal. Thus, we agree with the ALJ that there is no reason to question these principals' sincerity or intention to carry out their specific duties. (I.D., Conclusions, para. 19.) Merrimack is entitled to the full 67.95% quantitative integration credit awarded by the ALJ.

9. Community also excepts generally to Sunrise's integration proposal but fails to advance sufficient or specific justification to warrant a reduction of Sunrise's quantitative credit. With respect to its own integration proposal, Community excepts to the diminution for its non-integrated non-voting stockholders and to the disallowance of its 9% part-time proposal. Community is correct that its proposal should not be diminished because of its equity ownership. See para. 7, *supra*. Additionally, we will allow Community credit for the part-time station participation of its 9% stockholder Martin Nankin. At the time the application was filed (January 16, 1978), Community represented that Nankin would work part time at the station as national/regional sales director, and he testified at the hearing that he would work 20 hours. Tr. 1559–60. This quantification of the hours is attacked as an upgrading since it occurred after the release of *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 45 RR 2d 1, on January 17, 1979, which established 20 hours as the cut-off point below which no integration credit would be given (Tr. 1432–33). We disagree that upgrading has occurred since Nankin is not now proposing to work more than part-time and thus has not improved his commitment or made a new

proposal inconsistent with his original representation. Accordingly, the other parties are not prejudiced by acceptance of Community's part-time proposal. Finally, we affirm the ALJ's conclusion that Community principal Peter Ferrand be credited for full-time participation at the station notwithstanding his response to interrogatories that he would devote a minimum of 35 hours per week to his duties. Community proposed that Ferrand would work full time and he clarified his proposal when he testified at hearing that he expected to devote 60 hours per week to the station. I.D., Findings, n.60. Community is entitled to 58% full-time and 9% part-time integration credit.

10. Although Gateway has a clear quantitative advantage in its integration of ownership and management, opposing parties urge that ancillary characteristics such as local residence and other qualitative attributes[3] conventionally considered "enhancements" under the generic "integration" criteria be used in this case to offset Gateway's quantitative advantage. They argue, in essence, that so long as the controlling owners of an applicant (i.e., 51% of voting control) are integrated, the Commission should turn its focus to qualitative characteristics. In truth, there is much that is seductive in the proposition that so long as *de jure* control of an applicant is in the hands of local owners, any purely quantitative advantage of another applicant becomes less meaningful. And, in fact, the Commission does place great emphasis on the control aspect of broadcast interests for many purposes, so much so that Gateway's own integration credit has been raised—by operation of law[4]—from 80% to 100% because the 80% Gateway owners have *100%* of the actual voting control. Hence, it can be asked (with some force of logic): "Why should *local controlling* integrated owners not be preferred to *controlling integrated* owners who are *not local?* Why the stress on *quantitative* rather than *qualitative* integration?" Indeed, the customary comparative preference for those applicants whose integration percentile is simply higher from a mathematical standpoint has been denounced recently as "mechanistic."[5]

11. The legal answer, we believe, lies squarely in the cardinal structural priorities established by the Commission in the 1965 *Comparative Policy Statement*, 1 FCC 2d 393 (1965), and by which this Board is bound. Therein the Commission specified six discrete criteria to be applied

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[3] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395–96 (1965).

[4] In *Central Texas Broadcasting Co., Ltd., supra*, a 1% equity owner was the only general partner and had 100% integration credit. Ironically, in this proceeding, the ALJ reduced Gateway's quantitative credit from 100% to 80% since 20% limited partners were not entitled to integration credit even though they proposed to work full time at the station.

[5] In one case currently under appeal, a losing applicant has gone so far as to contend that the Board "has reduced comparative licensing to an exercise in first grade arithmetic." New Continental Broadcasting Co. Application for Review, p. 9, in *New Continental Broadcasting Co., 88 FCC 2d 631 (Rev. Bd. 1981).*

comparatively.[6] While the Commission stipulated that "[d]iversification is a factor of *primary* significance" (*id.* at 394) (emphasis added), it also indicated that full-time participation by owners (or, "integration") is of "substantial importance" (*id.*, at 395) and is "important in securing the best practicable service" (*id.*, at 395). Its reasons for awarding what it called a *"per se"* preference for ownership integration (*id.*, at 396) were stated thusly by the Commission.

> We consider this factor to be of substantial importance. It is inherently desirable that legal responsibility and day-to-day performance be closely associated. In addition, there is a likelihood of greater sensitivity to an area's changing needs, and of programming designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station. This factor is thus important in securing the best practicable service. It also frequently complements the objective of diversification, since concentrations of control are necessarily achieved at the expense of integrated ownership. [*Id.* at 395.]

12. Thereafter, but under the basic criterion of "full-time participation," the Commission discussed some refining corollaries. Hence,

> Attributes of participating owners, such as their experience and local residence, will also be considered in weighing integration of ownership and management. While, for the reasons given above, integration of ownership and management is important *per se*, its value is increased if the participating owners are local residents and if they have experience in the field. Participation in station affairs on the basis described above by a local resident indicates a likelihood of continuing knowledge of changing local interests and needs. Previous broadcast experience, while not so significant as local residence, also has some value when put to use through integration of ownership and management.
>
> Past participation in civic affairs will be considered as a part of a participating owner's local residence background, as will any other local activities indicating a knowledge of and interest in the welfare of the community. [*Id.* at 395–396.]

In practice, therefore, the foregoing qualtitative "attributes" have been applied merely as "enhancements" which strengthen any basic, or *per se*, integration preference. *See, e.g., New Continental Broadcasting Co.*, 88 FCC 2d 830, 50 RR 2d 1117 (Rev. Bd. 1981). The mechanics of this enhancement process are hardly new: they have been followed without deviation since the very inception of the *Policy Statement*. *See, e.g., Farragut Television Corp.*, 8 FCC 2d 279, 10 RR 2d 50 (1967); *Flower City Television Corp.*, 9 FCC 2d 249, 10 RR 2d 1059 (1967).

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[6] These are: (1) Diversification of control of the media of mass communications; (2) *full-time participation in station operations by owners;* (3) proposed program service; (4) past broadcast record; (5) efficient use of frequency; and (6) character.

13. The qualitative "enhancement" for local residence has not been neglected at all by the Board. In fact, in comparative cases where no quantitative differential in ownership integration was present, various enhancing factors have sometimes been dispositive. *See, e.g., Waters Broadcasting Corp.*, 88 FCC 2d 1204 (Rev. Bd. 1981), reversed, FCC 82–483, released December 1, 1982, (failure to accord sufficient weight to residence and civic activities in service area). And, indeed, the Board has heeded the Commission's *Policy Statement* instruction that "slight credit" is even to be given for local residence of owners "where there is not the substantial participation to which we will accord merit under this [integration] heading." *See Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046 (Rev. Bd. 1982), citing *Policy Statement*, 1 FCC 2d at 396.

14. However, our frequent recognition of the local ownership enhancement should not obscure the fundamental fact that the *operative criterion mandated by the Commission is "[F]ull-time participation in station operation by owners,"*[7] not local residence. Local residence, by itself and without active management duties, is not an enumerated Commission criterion. Presumably, had the Commission desired that the quality of local ownership have a heavier comparative emphasis, it could have structured its *Policy Statement* in a manner which specified "Local Residence" as the seminal criterion and subordinated the integration aspect to the position of an "enhancing" factor. By making integration the basic criterion, however, the Commission has clearly enunciated its own value hierarchy and the Board will not, of course, invert that pyramid. Moreover, just as we have acknowledged that there is much to be said for local residence (and we have recently said "much"),[8] there is also much to be said for the Commission's having emphasized even more strongly the factor of full-time participation by station owners. After all, there is to be derived from human experience the strong presumption that equity owners—whose money is actually on the line—will be more sensitive to a station's operations than those persons with no risk capital at stake. Things in general seem to go better with the interested owner on the scene.[9] Not always, but usually. Important also, is the Commission's stated view that the station will be more responsive to the community if the owner—who has the ultimate say in programs and practices—is in an immediate position to managerially respond to "changing needs." *See* 1 FCC 2d at 395. In any event, and as matter of law, it is upon ownership

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[7] *Policy Statement, supra* at 395. Residual credit sought by both Merrimack and Community for the local residence of stockholders working less than 20 hours will therefore be credited. *Midwest Broadcasting Co., supra.*

[8] *See, e.g., Waters Broadcasting Corp., supra; Greater Wichita Telecasting, Inc., supra;* and *Birmingham Family Television, Inc., supra.*

[9] Even "[t]he ox knoweth his owner and the ass his master's crib." *The Book of Prophet, Isaiah* 1:3.

integration that the Commission has expressly placed its prime priority, not upon local residence.

15. Accordingly, and in the seventeen years of comparative proceedings under the *Policy Statement*, no case of which we are aware has been decided where the applicant with the clear quantitative integration advantage did not receive the preference under this criterion. For the Board to change course in the instant case would be to "make new law," we believe, and some fundamental "new law" at that. In due deference to the Commission's role as the policy-maker, we decline to vary from the unanimous weight of case precedent favoring that applicant with the appreciable quantitative integration edge, however attractive or seductive the temptation. In view of Gateway's (effective) 100% integration credit, it is enitled, as we see it, to the highest preference under the relevant criterion.

16. For reasons that follow in logical course, we will not diminish Gateway's quantitative integration credit because DiCarlo, the 70% general partner who will be the station's general manager, intends to live 40 minutes away in Newton, Massachusetts. Merrimack asserts that such diminution is compelled because the Commission's concept of integration, of necessity, also *assumes* that a full-time participating owner will maintain residence and live, at least, in the service area of station if not in the community of license. In support, Merrimack cites language in *Flower City Television Corp.*, 9 FCC 2d 249, 254 (1967), wherein the Commission stated that ". . . as noted in the *Policy Statement*, persons participating full time in station operation by definition will become local residents." To similar effect is some verbiage in the more recent *Alexander S. Klein, 86 FCC 2d 423, 430 n. 30, where the Commission noted: "We have held that full-time integration is tantamount to proposed local residence." Again, there is some appeal in Merrimack's argument. However, and courting pedantry, we must infer from the larger structure and the reasoning of the Policy Statement* that, in general, local residence can be assumed without actually being *required*. As discussed above, an applicant's local residence is considered an enhancing bonus because it presumes a native's familiarity with the community. Full-time participation by an owner is said by the *Policy Statement* to merit *per se* credit, however, for a slightly different reason: *i.e.*, because the owner(s)—who have the final word on a station's policies, programs, and practices—are actually in management positions where they can make immediate adjustments to changing needs. Because local residence is mentioned under the basic criterion of integration only as an enhancing factor rather than a co-equal comparative factor, we must infer from the *Policy Statement* that past familiarity with the community is of enhancing value, of course, but of lesser value than integration *per se*. Merrimack does not contend strongly that Di-

Carlo will not be the station's full-time general manager. If DiCarlo, a 70% owner, is the general manager, it cannot be said that he has not met the "full-time participation" criterion of the *Policy Statement;* he merely gets no additional enhancement credit for local residence. Our interpretation on this matter is reinforced by the fact that the *Policy Statement* specifically contemplates and—separately and distinctly—affords independent merit for "[p]roposed future local residence" as well as past residence (*id.*, 1 FCC 2d at 396), although proposed *future* local residence is to be "accorded less weight than previous residence of several years' duration." (*Id.*) Hence, were *future* local residence considered to be *compulsory* for the award of the *per se* ownership integration credit, we are at a loss to explain why the Commission would give *special enhancing* weight to something (future local residence) already compulsory. Were we ever to be confronted with a case where a proposed full-time integrated owner lived at such a distance as to call into question the general assumption of the proposed principal's predictive sensitivity to the changing needs of the station's community, we would address the question of credit in such case directly under the issue of "integration," not obliquely through the lesser enhancing quality of proposed future residence. But, this is not such a case since it is averred (without contradiction) that DiCarlo will reside only 30–40 minutes from his station, a circumstance which will not distinguish him materially from thousands of other integrated owners throughout the country. In this case, then, Gateway will receive integration credit for DiCarlo's full-time participation, *sans*, of course, the enhancement for past local residence or the more slight enhancement credit separately specified by the Commission for proposed future local residence.[10] Gateway's 100% integration proposal, enhanced very slightly by Kruglak's proposed local residence and extensive broadcast experience, is entitled to a slight-to-moderate integration preference over the competing applicants under the integration criterion. *See WHW Enterprises, Inc., supra* (moderate preference given for 100% vs. 66 2/3% advantage) and *Bradley, Hand, and Triplett, supra* (slight preference given for 100% vs. 80% difference).

17. With respect to the comparative ranking of the remaining applicants under this criterion, Sunrise (70% full-time integration) and Merrimack (67.95%) are very close with Community (58% full-time, 9% part-time) slightly behind. We are of the view, however, that Sunrise's proposal has a very slight edge over that of Merrimack, and a slightly greater edge over Community's proposal. Sunrise has the greatest quantitative full-time integration (70% vs. 67.95% and 58%), the largest percentage of local residence (70% vs. 53.85% and 43%), and the most female participation

[10] Similarly, Community will receive integration credit for its integrated principal, Edward Lithgow, who does not propose to move to Nashua.

(24% vs. 23.08% and 20%). Although Merrimack's principals offer somewhat more extensive civic participation, all three applicants are well-enhanced in this regard, and while Community has more integrated owners with broadcast experience than the others, this is a factor of relatively minor significance. Therefore, we conclude that Sunrise is entitled to a very slight preference over Merrimack and a slight preference over Community under the integration criterion.

18. *Diversification of Control of the Media of Mass Communications.* Neither Merrimack, Sunrise nor Gateway or their principals have any other media interests. At the time the applicants' proposals were fixed for comparative purposes, Martin Nankin, a 9% stockholder of Community, held a 50% interest in a company which publishes a monthly newspaper devoted to business news in New Hampshire, including a Nashua circulation of about 750 to 1000 subscribers. He is also a director of a company which publishes a monthly children's magazine with 15 to 25 subscribers in Nashua. The ALJ assessed a very slight demerit against Community under the diversification criterion based on Nankin's media interests. In its exceptions, Community contends that the media interests are inconsequential and that imposition of a demerit is error. It contends further that the ALJ erred in failing to impose substantial demerits against Merrimack, Sunrise and Gateway in the FM evaluation because of their pending AM applications. Community argues that the general policy of ignoring pending applications in evaluating diversification is inapplicable here where AM and FM applications are to be acted upon simultaneously, citing *Webster-Baker Broadcasting Co.*, 45 RR 2d 724, 726 n.5 (1979).

19. Community's exceptions will be denied. Initially, we agree with the ALJ that a demerit should be imposed against Community because of Nankin's interest in a newspaper which is distributed in Nashua. The circulation of the newspaper is approximately 14,000, which is not insubstantial, and most of which is in New Hampshire; it therefore must be considered under the diversification criterion. On these facts, however, the weight of the demerit is very slight. Community's conention that the pending AM applications should be considered in the FM evaluation is also incorrect. We believe the ALJ correctly interpreted *Webster-Baker* to stand for the proposition that once a determination has been made as to which of the parties in a double grant proceeding will be awarded one of the broadcast facilities, that grant will be taken into account under the diversification criterion in assessing the successful applicant's comparative position for the remaining facility. I.D., Conclusions, para. 16. Community would have us consider the applications in making the initial grant and thus attribute media ownership to an applicant who has no such interests, an anomaly we do not believe the Commission intended. Instead, we will follow logic and the law and not count against an applicant a

mere application. *See Hi-Point Broadcasting Co.*, 14 FCC 2d 365, 13 RR 2d 1230 (Rev. Bd. 1968).

20. *Comparative Coverage.* The ALJ found that Gateway's FM proposal would serve 111,674 people in 126 square miles more than the other FM proposals and that this population and area receive no fewer than five primary aural services. I.D., Findings, paras. 261 and 262. He awarded Gateway a very slight preference for this superior coverage. Gateway urges that the preference be increased to slight, whereas Community argues that Gateway is not entitled to any preference. Both exceptions will be denied. Gateway is entitled to a preference but that preference is very slight since the people to be served already receive abundance of radio service. *See Resort Broadcasting Co., Inc.*, 41 FCC 2d 640, 27 RR 2d 1379 (Rev. Bd. 1973).

21. *Reporting Issues - Sunrise.* The ALJ devoted paragraphs 263–366 of his Findings and 2–13 of his Conclusions to the question of whether Sunrise timely disclosed the nature and scope of the business and financial interests of its principals as required by Sections 73.3514 and 1.65 of the Commission's Rules, 47 CFR § 73.3514 and 47 CFR § 1.65. Section 73.3514 requires that an application include all information called for by the application form, and Section 1.65 requires an applicant to amend its pending application within 30 days whenever the information furnished therein is no longer substantially accurate and complete in all significant respects, or there has been a substantial change as to any other matter which may be of decisional significance. The ALJ found that various business and financial interests of Sunrise's principals had been omitted from Table II of its application in violation of Section 73.3514[11] and that a member of subsequent interests were not timely reported as required by Section 1.65. He concluded, however, that such derelictions resulted from the principals' misunderstanding of the Commission's reporting requirements and that no intent to conceal or to mislead was established on the record. The ALJ assessed slight demerits against Sunrise for both rule violations.

22. Merrimack, Community, and Gateway all argue that Sunrise should be assessed a substantial demerit for the rule violations. Specifically, with respect to Section 73.3514, Merrimack contends that the evidence reflects that Sunrise principal Samuel Tamposi, Jr., was advised by counsel of his reporting obligations and that he knowingly submitted incomplete information. In support of this contention, Merrimack charges that the ALJ wrongly characterized counsel's advice and made findings contrary to the

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[11] Table II of the application form (FCC Form 301) in effect at the time of filing in this case required information concerning the occupation, business, and financial interests of the applicant and of each party to the application during the past five years; specifically, aside from a party's principal occupations and businesses, only those businesses or financial interests in which a party had either a 25% or greater interest or any official relationships were to be reported.

record evidence regarding Tamposi's understanding of the Table II requirements because they fail to take account of the testimony of Tamposi's sister or of counsel. Merrimack also takes issue with the demerit assessed under Section 1.65, alleging that Sunrise's conduct in reporting some changes while omitting others is not consistent with its understanding of the rule as represented at hearing. Community and Gateway do not except to the ALJ's findings but argue that Commission precedent requires a greater comparative demerit. Additionally, Community argues that a substantial demerit should be assessed against Sunrise for falsely stating in response to an interrogatory that it had no basis for believing that its application was not complete and correct.

23. We will affirm the ALJ's findings on this matter. As to Section 73.3514, we reject the contention that Samuel Tamposi knowingly submitted incomplete information to the Commission. Although it is clear from the record that counsel had difficulty recalling the precise advice given the Sunrise principals, the ALJ's findings are a reasonable and fair reflection of his testimony. See, for example, Tr. 1883, 1832, 1892, and 1980–81. Moreover, the testimony of counsel and Tamposi's sister is insufficient to establish that Samuel Tamposi accurately understood the reporting requirements and therefore knowingly submitted incomplete information to the Commission. The ALJ considered this testimony and recognized that the witnesses' recollections on the advice given by counsel were not fully consistent but, in view of the passage of time involved, reasonably concluded that the differences were not significant. He stated that he had observed these individuals during their testimony and found that they were forthright and candid. I.D., Conclusions, p. 7. Absent more persuasive testimony to the contrary, the ALJ's determination concerning their demeanor is entitled to special deference. *See New Continental Broadcasting Co., supra* at 840, 50 RR 2d at 1126; *Radio Gaithersburg, Inc.*, 72 FCC 2d 821, 827, 45 RR 2d 1709, 1713 (Rev. Bd. 1979). As to Section 1.65, we disagree with Merrimack that there is significance in the alleged inconsistencies between the reported and non-reported items. Sunrise reported changes which its principals believed would potentially impact on their comparative posture (Tr. 2003, 2048, 2150–51, 2539–40, 2595–96, and 2706–2710) and disregarded those changes which they believed could not affect the comparative criteria. This distinction was not shown to be disingenuous or even unreasonable. Moreover, the precedent cited[12] by the exceptors to support imposing greater demerits against Sunrise are not apposite. Those cases all involved situations where decisionally significant information was not re-

[12] *Payne of Virginia, Inc.*, 45 FCC 2d 170, 29 RR 2d 495 (Rev. Bd. 1974), reversed in part, 60 FCC 2d 484, 38 RR 2d 63 (1976); *Vogel–Ellington Corp.*, 41 FCC 2d 1005, 27 RR 2d 1685 (Rev. Bd. 1973); and *Cleveland Broadcasting, Inc., 7 FCC 2d 680, 9 RR 2d 941 (Rev. Bd. 1967).*

ported. Here, information that was believed to have potential importance was filed and the failure to report other information, which the ALJ found did not affect Sunrise's comparative posture (I.D., n. 127), stemmed from the principals' misunderstanding of the Commission's reporting requirements rather than from culpable intent. Finally, the ALJ correctly rejected Community's contention that Sunrise's response to interrogatory was false since the answer was literally true and did not disclose an intention to deceive. (I.D., Conclusions, para. 13.)[13] In light of the above, we do not believe that any comparative demerit is warranted. Although a Section 1.65 issue may lie where an applicant has failed to report substantial charges which may be of decisional significance, and while there is language in some prior precedent indicating that a comparative demerit would be warranted even where the violations are unintentional, *see Radio Laredo, Inc.*, 87 FCC 2d 353, 361 (Rev. Bd. 1981), we are of the view that the better policy is that a demerit should not be imposed where, as here, it has been concluded after an evidentiary hearing that the unreported material was not decisionally significant and no intent to conceal or mislead the Commission was established on the record. *See Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 50 RR 2d 1143 (Rev. Bd. 1982).[14]

24. *Reporting Issues - Gateway.* The ALJ assessed a slight demerit against Gateway under a Section 1.65 issue based on its failure to report timely a change of employment of Kruglak, a general partner, and Augusta Hornblower, one of Gateway's limited partners, and a change in Hornblower's residence. He concluded, however, that these failures were unintentional. I.D., Conclusions, para. 25. Gateway contends in its exceptions that no comparative demerit is warranted. We agree. The untimely reported information was not of decisional significance, see I.D., Findings, paras. 176–178, and, as the ALJ noted, no intent to conceal, deceive or mislead the Commission was shown. *See Webster-Baker Broadcasting Co., supra.* In these circumstances, we conclude the omissions have no impact on Gateway's comparative qualifications. See para. 23, *supra.*

25. *Miscellaneous Exceptions.* Community initially contends that the Commission erred in denying its request for separate hearings on the AM and FM applications. The exception will be denied. The Commission has already thoroughly considered this matter in the Hearing Designation

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[13] Community also seeks an additional comparative demerit against Sunrise for failure to submit evidence under the Section 1.65 issue on stockholders deleted prior to the comparative cutoff date. This contention is rejected. Community has not cited any record evidence to show that there are unreported interests of Sunrise's former principals or that this subject is relevant to the designated issue.

[14] Sunrise argues that the comparative aspect of the Section 73.3514 issue has been mooted by the Commission's elimination of Table II type information from the application. We reject this exception because the issue was based on the alleged non-reporting of information then required by the application form. Sunrise's remaining exceptions have not raised any decisionally significant matter that has not been adequately considered by the ALJ. See, I.D., Conclusions, paras. 2, 4, 7 and 12.

Order, *supra*, and in the absence of new facts or circumstances, the Board is precluded from reviewing the Commission's determination. *See Atlantic Broadcasting Co.*, 5 FCC 2d 717, 8 RR 2d 991 (1966). Community further contends that the ALJ erred in failing to add a site availability issue against Gateway, and character issues against Sunrise for the latter's failure to report negotiations with Richard Balsbough to become a Sunrise principal and to delete from its application the incorrect statement that it had retained a consultant. These exceptions are also denied. The ALJ properly denied the site availability issue on the grounds that Sunrise had failed to comply with Section 1.229(d) of the Commission's rules by not submitting an affidavit of a person with personal knowledge that the proposed transmitter site was unavailable. FCC 80M–613, released April 14, 1980. Other than merely to assert error, Community has not pointed out where particularly where the ALJ was in error. See Section 1.277(a) of the Commission's Rules. The requested character issues against Sunrise were also properly denied by the ALJ. Although it is undisputed that Balsbough was offered an opportunity to join Sunrise, the ALJ correctly pointed out that unconsummated agreements or negotiations need not be reported to the Commission, and furthermore, on the basis of Balsough's affidavit, it appears he never agreed to be a principal of Sunrise. See FCC 80M–1838, released October 2, 1980. Additionally, the fact that Sunrise reported in its application that it retained the services of a consultant, a representation which has never been deleted, is no basis for a character issue since the affidavit of Sunrise principal Phil David Fine established that the consultant offered to render assistance and in fact did so on several occasions. *Id.* Finally, Sunrise excepts to the ALJ's failure to add Section 1.65, financial, and character issues against Community. It requests, however, that the issues be added and the proceeding remanded only in the event Community is awarded one of the stations. The issues will not be added. Community has not been awarded a station permit and, in any case, the ALJ thoroughly considered the allegations raised by Sunrise and properly concluded on the merits that no issues were warranted. See FCC 81M–3215, released October 9, 1981; FCC 81M–3730, released November 24, 1981; and FCC 82M–0965, released March 26, 1982.

26. *Final Comparative Evaluation.* All exceptions having decisional significance have been considered by the Board. In light of our evaluation, we conclude that Gateway is the best comparative applicant because of its slight-to-moderate integration preference and very slight comparative coverage preference over the other applicants, and its very slight diversification preference over Community. We conclude further that Sunrise is the second best comparative applicant because of its very slight integration preference over Merrimack and slight integration and very slight diversification preferences over Community. In accordance with these

preferences and the expressed choices of the applicants, we conclude that a grant of Gateway's FM application and Sunrise's AM application will best serve the public interest, convenience and necessity.

27. ACCORDINGLY, IT IS ORDERED, That the motions for leave to amend filed by Community Service Broadcasting of Nashua, Inc. on July 26, November 1, and November 15, 1982, and by Merrimack Valley Broadcasting, Inc. on April 14, and August 11, 1982, ARE GRANTED, and the amendments ARE ACCEPTED; and

28. IT IS FURTHER ORDERED, That the petitions for leave to amend filed April 14, and June 21, 1982 and the petition for leave to file statement filed April 22, 1982 by Sunrise Broadcasting Corp., ARE GRANTED, and the amendments and statement ARE ACCEPTED; and

29. IT IS FURTHER ORDERED, That the motion to correct transcript of oral argument filed by Merrimack Valley Broadcasting, Inc. on October 7, 1982, IS GRANTED; and

30. IT IS FURTHER ORDERED, That the applications of Gateway Broadcasting Associates (File No. BPH–10, 928) and Sunrise Broadcasting Corp. (File No. BP–21,102) ARE GRANTED; and

31. IT IS FURTHER ORDERED, That the applications of Merrimack Valley Broadcasting, Inc. (File Nos. BP–21,101 and BPH–10,926), Sunrise Broadcasting Corp. (File No. BPH–10,925), Gateway Broadcasting Associates (File No. BP–21,103), and Community Service Broadcasting of Nashua, Inc. (File No. BPH–10,927) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FCC 82D–26

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
MERRIMACK VALLEY BROADCASTING, INC. Nashua, New Hampshire	BC DOCKET NO. 80–28 File No. BP–21,101
	BC DOCKET NO. 80–29 File No. BPH–10,926
SUNRISE BROADCASTING CORP. Nashua, New Hampshire	BC DOCKET NO. 80–30 File No. BP–21,102
	BC DOCKET NO. 80–31 File No. BPH–10,925
Mario DiCarlo, Norman M. Kruglak, Augusta Hornblower and Ada Harkaway A Limited Partnership d/b/a GATEWAY BROADCASTING ASSOCIATES Nashua, New Hampshire	BC DOCKET NO. 80–32 File No. BP–21,103
	BC DOCKET NO. 80–33 File No. BPH–10,928
COMMUNITY SERVICE BROADCASTING OF NASHUA, INC. Nashua, New Hampshire	BC DOCKET NO. 80–35 File No. BPH–10,927

For Construction Permits for New AM and/or FM Stations to Replace the Deleted Facilities of Stations WOTW (900 kHz, 1kW D) and WOTW-FM (106.3 MHz, Channel No. 292), Nashua, New Hampshire.

Appearances

James K. Edmundson on behalf of Merrimack Valley Broadcasting, Inc.; *Robert B. Jacobi, Stanley Cohen, Cheryle Stein* and *Lawrence Cohn* on behalf of Sunrise Broadcasting Corp.; *Thomas W. Fletcher* on behalf of Gateway Broadcasting Associates; *Sydney F. Arak* on behalf of Gateway Communications; *Raymond J. Kimball, Walter Sweeney* and *D. Daniel McCarthy* on behalf of Community Service Broadcasting of Nashua, Inc.; and *Lawrence Bernstein* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION
OF
ASSISTANT CHIEF ADMINISTRATIVE LAW JUDGE THOMAS B. FITZPATRICK

Issued: April 8, 1982 ; Released: April 19, 1982

Preliminary Statement

1. This proceeding concerns the applications of Merrimack Valley Broadcasting, Inc. (Merrimack), Sunrise Broadcasting Corp. (Sunrise), Gateway Broadcasting Associates (Gateway), and Community Service Broadcasting of Nashua, Inc. (Community) for construction permits for new AM and/or FM stations to replace the deleted facilities of Stations WOTW and WOTW-FM, Nashua, New Hampshire.[1] These applications were designated for comparative hearing by *Memorandum Opinion and Order* (FCC 80–50) released February 13, 1980, and published in the *Federal Register*, February 26, 1980 (45 FR 12484).

2. The issues specified by the Commission in the designation order are as follows:

> 1. To determine whether Gateway Broadcasting Associates interviewed leaders of women's groups in connection with its ascertainment efforts.
>
> 2. To determine when Gateway Communications[2] conducted its survey of community leaders and, in light of this information, whether its survey complied with Commission requirements.

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[1] Merrimack, Sunrise and Gateway have applied for both AM and FM stations. Community has applied for an FM station.

[2] The application of Gateway Communications was dismissed by *Memorandum Opinion and Order* (FCC 80M–604), released April 11, 1980. This mooted issues 2–4.

3. To determine whether Gateway Communications failed to report to the Commission the application of Ocean Coast Properties for changes in the facilities of Station WFEA, Manchester, New Hampshire, and, if so, the effect thereof on the applicant's comparative qualifications to be a Commission licensee.

4. To determine whether the rate card of Ocean Coast Properties' Stations WPOR-AM and WPOR-FM misrepresented the Stations' service contours, and, if so, the effect thereof on Gateway Communications' basic and/or comparative qualifications to be a Commission licensee.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine in light of the evidence adduced pursuant to the foregoing issues which of the applications should be granted.

3. Since the applicants' data indicated that there would be a significant difference in the size of the areas and populations which would receive service from the FM proposals, the *Hearing Designation Order* specified that the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, would be considered under the standard comparative issue.

4. On April 29, 1980, Gateway Broadcasting Associates (Gateway) filed a motion for partial summary decision with respect to Issue 1. By *Memorandum Opinion and Order* (FCC 80M–869), released May 29, 1980, summary decision was rendered in favor of Gateway as to Issue 1.

5. The Presiding Judge, by *Memorandum Opinion and Order* (FCC 80M–1159), released July 8, 1980, granted a "Petition To Enlarge Issues Against Gateway Broadcasting Associates," filed June 3, 1980 by Community to the extent that the comparative issue was enlarged to encompass questions of possible violations of Section 1.65 of the Rules, 47 C.F.R. 1.65 by Gateway.

6. Prehearing conferences were held on March 28, April 21 and May 30, 1980. Hearing sessions were conducted on June 23, 25, 26 and 30, and July 1, 2, 3, 7 and 8, 1980.

7. On July 31, 1980, Merrimack Valley Broadcasting, Inc. filed a motion to enlarge issues. By *Memorandum Opinion and Order* (FCC 80M–1794), released September 24, 1980, the Presiding Judge granted the motion and enlarged the issues to include the following:

To determine whether Sunrise Broadcasting Corp. timely disclosed the nature and scope of the business and financial interests of its principals, as required by Section II, Table II, of its applications in compliance with Section 1.65 of the Commission's Rules, 47 C.F.R. 1.65, and if not, the effect of such failure on the basic and/or comparative qualifications of the applicant.

8. The enlarged issue was modified by the Presiding Judge to include inquiry into Sunrise's compliance with 47 C.F.R. 73.3514. *Memorandum Opinion and Order* (FCC 81M–163), released January 21, 1981. Further hearing sessions were held in Washington, D. C. on January 13–16 and February 19 and 20, 1981. Supplemental Proposed Findings and Conclusions were filed by the parties on July 10, 1981 and Reply Findings were filed August 28, 1981. The Presiding Judge, by *Memorandum Opinion and Order* (FCC 81M–3730), released November 24, 1981, closed the record in this proceeding.

Findings of Fact

9. The applicants, Merrimack, Sunrise, and Gateway seek authorizations for the construction and operation of a standard broadcast station to be operated on the frequency 900 kHz, and a frequency modulation broadcast station to be operated on the frequency 106.3 MHz (Channel 292) at Nashua, New Hampshire. The applicant, Community, seeks authorization for the construction and operation of only a frequency modulation broadcast station to be operated on the frequency 106.3 MHz (Channel 292) at Nashua, New Hampshire.

A. The Community and Area To Be Served

10. The City of Nashua and the Towns of Hollis, Hudson, Litchfield, Merrimack, Amherst, Brookline, Lyndeboro, Milford, Mount Vernon, Pelham, Wilton, and Windham make up the southern New Hampshire region. The region is located in the center of New England. Nashua is located approximately 34 miles north of Boston, Massachusetts, 18 miles southwest of Manchester, New Hampshire, and 36 miles south of Concord, the capital of New Hampshire. Nashua, located on the Merrimack River, is at the head of the Nashua River (Gateway Ex. 1, p. 2).

11. The general population characteristics of Nashua, New Hampshire as of 1970 were as follows (*Ibid*):[3]

Total Population	55,820
Male Population	26,949
Female Population	28,871
Minority Population	428
Youth (17 yrs. & under)	20,516
Elderly (65 yrs. & older)	4,755

12. The City of Nashua, and each of the 12 towns in the region, are responsible for their own local government with a Board of Aldermen.

[3] Nearly 4500 of the SMSA's 66,693 residents, or 7%, were born in foreign countries, while another 15,300 persons, or 20%, were of foreign or mixed native and foreign parentage. (Sunrise Ex. 8, p. 6)

Several autonomous boards have administrative control over certain functions (Gateway Ex. 1, p. 2)

13. Public schools are administered by elected school boards and funded from property tax revenues. Each town is its own school district, with several districts combining efforts through cooperative or area agreements. More than 32,000 elementary and secondary pupils attend the area's 52 public and 9 parochial schools (Gateway Ex. 1, p. 3).

14. During 1975, retail sales in the region were $475 million. In 1972, the Nashua accounted for 11.6% of New Hampshire's wholesale trade, with 10% of the state's wholesale establishments. The City of Nashua had 74 wholesale establishments with a total wholesale trade of $95.376,000.

15. The community has the usual complement of civic and fraternal organizations. Health care is met essentially through the two community general hospitals, Memorial Hospital and St. Joseph Hospital, located in Nashua. The *Nashua Telegraph* is a newspaper published Monday-Saturday in Nashua. City Transit in Nashua is provided by the Hudson Bus Lines, and air service from Boire Field; the region is served by the Boston and Maine Railroad.

B. The Applicants

I. *Merrimack Valley Broadcasting, Inc.*

16. Merrimack is a stock corporation organized under the laws of the State of New Hampshire. Merrimack is authorized to issue 150,000 shares of common stock with a par value of $1.00 each and a vote of 1 per share. The offices, directors and stockholders of Merrimack are (Merrimack Ex. 1, pp. 1–3):

NAME AND RESIDENCE	*OFFICE*	*DIRECTOR*	*NUMBER OF SHARES*[4]	*% OF OWNERSHIP*
Joseph G. Sakey 60 Forest St. Lexington, MA 02173	President	Yes	840	17.95
Paul R. Shea 2 Larchmont Lane Lexington, MA 02173	Vice President	No	660	14.10
Sherman D. Horton 24 Swart Terrance Nashua, NH 03060	Clerk	No	300	6.41

[4] Merrimack, by subsequent amendments reported the issuance of additional shares of stock by Merrimack to its principals in order to continue to fund the prosecution of its applications.

NAME AND RESIDENCE	*OFFICE*	*DIRECTOR*	*NUMBER OF SHARES*[4]	*% OF OWNERSHIP*
Pauline E. Anderson 71 Tampa St. Nashua, NH 03060	Treasurer	No	480	10.26
Patricia M. Thurber 25 Swart Terrace Nashua, NH 03060		Yes	300	6.41
Selma R. Pastor 24 Stark St. Nashua, NH 03060		Yes	300	6.41
Thomas B. Kelley 21 Todd Road Nashua, NH 03060		No	300	6.41
Vincent F. Servello 120 Flagstone Drive Nashua, NH 03060		No	300	6.41
Rosemary T. Clough 12 No. Papperell Road Hollis, NH 03049	No	300	6.41	
Morton E. Goulder 97 Ridge Road Hollis, NH 03049	No	300	6.41	
Leon Lewandowski Quincy Lane Merrimack, NH 03054	No	300	6.41	
John P. Rich 67 Berkeley St. Nashua, NH 03060	No	300	6.41	

17. The Record of Organization (i.e., Articles of Incorporation) of Merrimack contains the following restriction concerning the transfer of the capital stock:

> In order to preserve the community responsiveness of this corporation, no stockholder may own more than twenty-five peracent (25%) of the capital stock of the corporation. Shares in excess of this limitation shall not be transferred on the records of the

corporation, but shall be held subject to conforming transfer orders. Any issue of stock following the initial issue voted at the first meeting of incorporators shall be charged with preemptive rights running in favor of the existing stockholders.

18. Merrimack proposes to integrate 7 stockholders full-time in the day-to-day operations of its proposed AM and/or FM stations. These stockholders will serve in these capacities if Merrimack is authorized to operate a combined AM/FM, FM only or AM only operation (Merrimack Ex. 2, pp. 1–2; TR. 180).

a. *Joseph G. Sakey*

19. As 17.95% stockholder, President and General Manager, Sakey will participate in the day-to-day programming, make decisions about, and direct the operation of Merrimack's proposed stations. Sakey will devote full time and a minimum of 40 hours a week to station management and operation. He will be the person to whom all other station employees are ultimately responsible. His managerial duties will entail articulating operating policies, overseeing their implementation, and assuming the profit/loss accountability for the station. He will be responsible for the administration and implementation of the equal employment opportunity program and for the relationship of the station to the community (Merrimack Ex. 2, Appendix A, p. 2)

20. If Merrimack receives the AM and/or FM grant, Sakey will move to Nashua. He will have no employment other than with Merrimack (TR. 336, 346, 351).

21. Sakey, presently a resident of Lexington, Massachusetts[5], was born May 5, 1925 in Boston, Massachusetts, where he attended elementary and high school.[6] Upon graduation from high school in 1943, Sakey was inducted into the U.S. Army where he served as a Medical Technician with the Ninth and Third Armies in Europe. Upon being honorably discharged in 1946, Sakey moved to Cambridge, Massachusetts and entered Northeastern University. In 1949, Sakey graduated with a B.A. in German Literature and entered the Graduate School at Simmons College in Boston. He was awarded a Master's degree in Library Science in 1950.

22. Sakey, in the summer of 1950, joined the staff of the Boston Public Library as a Cataloger in the Reference and Research Division. In April 1951, he was appointed Head Serials Librarian for the United States Air Force Cambridge Research Library in Watertown, Massachusetts. In June 1952 Sakey was appointed a Foreign Service Staff Officer with the U.S. Department of State and attended the Foreign Service Institute in

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[5] Unless otherwise stated, the Sakey biographical data is derived from Merrimack Ex.4

[6] Lexington is approximately 25–30 miles south of Nashua.

Washington. Shortly thereafter he married and was sent to India where he organized, developed, and planned the opening of and managed a new U.S. Information Library.

23. Sakey returned from India in 1953 and was appointed Assistant Director of the Framingham, Massachusetts Town Library System. In 1956, he moved to Nashua and was appointed Associated Director of the Nashua Public Library. He became its Director in 1959 and remained in that position until 1971. During this period Sakey helped plan, design and build a new branch library and a multi-million dollar main library complex. During his time in Nashua, he was a member and officer of a variety of civic, community, and state boards and commissions, and often appeared on radio panels and talk shows.[7]

24. In July 1971, Sakey became the Director of the Public Library System in Cambridge, Massachusetts. He is a member and/or officer of a variety of boards and commissions in Cambridge and has received awards and citations for his articles in that community. He has been active in a number of professional library organizations and has received awards for his participation.

25. Sakey held the following positions in Nashua and New Hampshire organizations:

Rotary Club of Nashua, 1957–1962
Board of Directors, 1960–1961

Nashua Symphony Association, 1960–1971
Incorporator
Vice-President, 1960–1964
President, 1964–1968
Director, 1966–1971

Nashua Choral Society, 1964–1971
Incorporator
President, 1964–1966

Arts and Science Center of Nashua, Inc., 1960 +
Incorporator
Vice-President, 1961 –
Acting President, 1966–1967
Life Trustee, 1960–1972
Trustee Emeritus, 1972 +

New Hampshire Council of World Affairs, 1956–1971
Board of Directors, 1957–1971

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[7] He also was part owner of a gift shop in Nashua from 1968 to 1971 (TR. 347).

Citizens Advisory Committee for WENH-TV, 1959

Y's Men (Service Club of WMCA), 1957–1962
Board of Directors, 1958–1960

Arts and Crafts League of Nashua, 1961–1968
Council Member, 1957–1959

American Red Cross, Nashua, N.H., 1964–1971
Director, 1964
Executive Board, 1965–1971

New Hampshire Governor's Task Force on State Reorganizations
Chairman, Historical and Cultural Departments, 1969

Family Planning Association, 1970
Incorporator
Director, 1970–1971

University of New Hampshire, Merrimack Valley Branch
Adviser to Library Technology Program

b. *Paul R. Shea*

26. As 14.10% stockholder, Vice President and Station Manager, Paul R. Shea will participate in the day-to-day programming, make decisions about, and direct the operation of Merrimack's proposed stations.[8] Shea will be responsible to the General Manager and will devote full time, and a minimum of 40 hours a week to station management and operation. He will be responsible for the day-to-day operation of the station, developing and carrying out program policies including the supervision of the execution of all local programming, and maintaining a proper balance between public service and commercial programming (TR. 474–475).

27. If Merrimack receives the AM and/or FM grants, Shea, who presently lives in Lexington, Massachusetts, will move to Nashua. He will have no employment other than with Merrimack (TR. 438–440, 443).

28. Paul Shea was born April 23, 1932, in Massachusetts.[9] He attended Cambridge schools and was graduated from Cambridge High and Latin School in 1949. Shea worked for the next two years in the insurance business before enlisting in the U.S. Marine Corps in 1951. He served in

[8] Shea could not specify how much time he would devote to the FM station if both the AM and FM were granted, explaining he would devote as much time as is necessary (TR. 469). No determination has been made as to how much time the other integrated owners would devote to the FM if both were granted (TR. 469).

[9] Unless otherwise stated, the biographical data relative to Shea was derived from Merrimack Ex. 5.

the infantry in Korea earning four battle stars and was honorably discharged as a Sergeant (TR. 184).

29. After completing two years at Suffolk University, Shea worked in sales for the next few years and married in 1961. In 1962, he joined United Fruit Company as an Administrative Assistant in the Treasurer's Office. He was subsequently appointed Deputy-Sheriff-Court Officer in the Middlesex Superior Court and the following year became administrative assistant to the Middlesex County Commission. In 1966, Shea was appointed the Head Executive Assistant to that Board.

30. In 1970, Shea became Personnel Director of the Middlesex County Hospital in Waltham, Massachusetts. He became its Director of Admissions in 1972 and its Director of Planning in 1977.[10] Effective October 16, 1980, he was employed as Administrative Assistant to the Chairman of the Board of the Bank of New Hampshire.

31. Shea has, in the past, participated in a number of community and association activities in Massachusetts.

32. Shea has not been involved in any Nashua civic activities. He has visited Nashua hundreds of times over the past 10 years and attended the Nashua Symphony and the Arts and Sciences Center (TR. 472, 481).

c. *Thomas B. Kelley*

33. As 6.41% stockholder and General Sales Manager, Kelley will make decisions about and direct the operation of Merrimack's proposed stations. He will devote full time and a minimum of 40 hours a week to station management and operation. As manager of the station's income producing unit,[11] Kelly's duties will entail the direction of local time sales and sales development. He will be responsible to the General Manager. Kelley will devise advertising and promotional campaigns for the station; coordinate network and/or agency accounts; maintain contacts with the station's national and/or regional representatives;[12] handle house accounts (those on which no one is commissioned); set up and conduct sales meetings; handle sales problems; work with salesmen in development of account lists; maintain a master account list; and develop station-client relations.[13]

34. If Merrimack receives the AM and/or FM grants, Kelley will terminate his present employment. He intends to serve out his term as city alderman, devoting 10 to 12 hours a week at nights to this position.

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[10] Between 1970 and 1972, Shea attended night school at Boston University and earned a B.A. in Urban Affairs. He is currently enrolled at the University in a masters program in the same field.

[11] Kelley did not personally prepare an estimate of the expenses of the sales department, although Merrimack did breakdown these expenses and reported its estimate by amendment dated November 22, 1978 (TR. 559, 594–599). Kelley did not separately estimate the projected revenues for the AM and FM stations and was unaware that Merrimack had done so (TR. 543–545).

[12] Kelley was not aware of the difference, in the broadcast industry, between national and regional sales. Nor was he familiar with the terms "rated market," "trade out," or "promotional consideration" (TR. 561–563, 588).

[13] Kelley first saw this list of specific duties three weeks prior to his June 26, 1980 testimony (TR. 551).

35. Kelley was born July 29, 1942 in Somerville, Massachusetts. He was educated in the Somerville school system, graduating from Somerville High School in June of 1960.[14]

36. He attended Boston College and graduated with a B.A. in Political Science with a minor in English History. After college, he did some substitution in the Somerville, Mass. school system on the secondary level. He entered the Army reserve and was on active duty from November 1960 to May 1961. He received an honorable discharge in 1967.

37. In June 1965, Kelley was hired by Nashua Corporation of Nashua as a sales trainee in the Packaging Division and at that time moved to Hollis, N.H. In May 1967 he was promoted to sales representative in the New England and up-state New York area. In December 1969, when Nashua Corporation formed the Computer Products Division, Kelley was the first sales person in that division. The area covered was the same New England and up-state New York territory.

38. In November 1973 Kelley left Nashua Corporation and joined the firm of Lapierre and Jenney, a local real estate developer. His position was marketing and purchasing manager. He also handled the sale of Erectofact Scaffolding Company which was owned by Lapierre and Jenney. The sale was accomplished only after it was returned to a profit status.

39. In December 1975, Lapierre and Jenney was dissolved. In February 1976 Kelley joined the firm of Welders Supply Company as a Branch Manager of their Portsmouth, N.H. branch. In January 1978, he joined Davidson Travel Service as an account representative. His duties included calling on and securing commercial business. In February 1979 he joined the Stemco Division of Colt Industries as their New England sales manager. Stemco is the leading manufacturer of oil seals and exhaust systems for the heavy duty truck industry. Kelley is presently employed by Stemco.

40. In June 1968 he was married and moved to Nashua, where he presently resides (TR. 539). Kelley's community activities include six years (1974 to present) as a member of the Board of Aldermen of the City of Nashua. He was elected in November 1979 to serve a four year term ending December 1983 and serves as Chairman of the School Building Committee. He is also a past President (1979) of the Nashua Humane Society, a member of the Board of Directors of the Greater Nashua United Way (1974 to present), and a member of the Rotary West Club of Nashua (1976 to present).

d. *Pauline E. Anderson*

41. As 10.26% stockholder, Treasurer and Community Affairs Director, Pauline E. Anderson will devote full time, and a minimum of 40 hours a

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[14] Unless otherwise stated, the biographical information as to Kelley is derived from Merrimack Ex. 9.

week, to station management and operation (TR. 484). She will be responsible to the Station Manager. Her managerial duties will entail assuring that the station fulfills its FCC commitments for Public affairs programming and public service announcements (TR. 523).[15] Her work will include: conducting continuing surveys of community problems and developing programs responsive to those problems (TR. 524); developing dialogue on public issues; attempting to make the station known through locally produced programming, as a champion for civic improvement and the promotion of public safety, racial and religious understanding; actively soliciting public service announcements; establishing public service campaigns in which a schedule of announcements is run to accomplish a specific goal; and working with station staff responsible for educational, minority, and women's affairs programming in developing the station's programming (TR. 552).

42. Mrs. Anderson intends to continue to devote two to five hours per week to her participation in local civic activities. She will have no employment other than with Merrimack (TR. 488–489, 534–538).

43. Pauline Anderson was born July 12, 1928 in Fitchburg, Massachusetts.[16] She graduated from high school in 1946. She briefly attended Fitchburg State Teachers College before moving to Brighton, Massachusetts in 1947. She enrolled in the Chandler School for Women in Boston, graduating in 1948. Anderson worked as a secretary at the Massachusetts Institute of Technology in a project of the Atomic Energy Commission until her marriage and relocation to Fitchburg in 1949. She then worked as a secretary in Fitchburg, until the birth of her first child in 1950.

44. Mrs. Anderson is the mother of three children and was a full time homemaker from 1950 until 1965. She moved to Nashua in 1955.

45. Mrs. Anderson was an active member of St. Christopher Parish, Nashua, during the years while she was a homemaker; became a teacher of Christian Doctrine in 1960 and assumed the position of Coordinator of Teachers for the Confraternity of Christian Doctrine for St. Christopher Parish during the years 1963 to 1967. She also served on the first school board for St. Christopher Parish during this time.

46. In 1965, Mrs. Anderson took a part time position with International Typing Company in Lowell, Massachusetts, a fund-raising organization handling a direct mail campaign to raise funds for Bishop Paul Seitz, Bishop of Kontum, Vietnam. In 1969, she was employed part time with

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[15] Although Mrs. Anderson was aware of the public affairs programs proposed by Merrimack, she did not recall the percentage of time Merrimack proposed to devote to public affairs programming in its AM and FM applications, nor did she know the Commission's definition of public affairs programming (TR. 489, 491–493, 519–520).

[16] Unless otherwise stated, the biographical data with respect to Mrs. Anderson was derived from Merrimack Ex. 6.

the Nashua Public Library as an assistant in the children's department. She assumed a full time position in 1970 as Community Services Coordinator for the Nashua Public Library. As community services coordinator, she was responsible for making the library attractive and accessible to the community at large. She was also responsible for communications with agencies, with the news media and with the public about the services and programs of the library. Mrs. Anderson was elected to the Nashua Board of Education in November of 1973 in a city-wide election.

47. She left the library in 1975 and took part time community affairs position with the Greater Nashua Chamber of Commerce. She was responsible for public relations for the Chamber and for the involvement of the Chamber in the community activities of Nashua and the surrounding area. Mrs. Anderson accepted a position with New Hamphshire Legal Assistance as Director of a Consumer Energy Project (funded by the Campaign for Human Development, a national program of the Catholic Bishops of America). From February 1976 to July 1977 she headed up this statewide project on utility matters. She implemented public discussions on a statewide basis on the issues of electric rate reform, conservation, need for consumer advocate, and legislative issues on utility matters. She appeared on several radio stations in the state, either as a participant in a forum or as a guest on a public service program. New Hampshire Legal Assistance did not apply for refunding and the project ended in July 1977. During this time period, Mrs. Anderson was elected to serve out the term of Alderman from Ward 4 in Nashua. She served from July 1977 to January 1978.

48. In June 1978, Mrs. Anderson became the Community Legal Education Director for New Hampshire Legal Assistance and resumed working for the statewide legal services program. She is still employed in this position, with responsibilities for communication with the public on legal issues. Her duties include the production of a newsletter, pamphlets, public service announcements, scheduling radio appearances, participating in radio forums[17], and news releases on issues of concern to the clients served by New Hampshire Legal Assistance (TR. 484, 487).

49. Mrs. Anderson has been active politically and in the following civic organizations (TR. 486–7, 524–8):

Member and Secretary of North End Parent Teacher Organization, Nashua: 1954–1958

Member of Nashua League of Women Voters: 1956 to present
Treasurer of LWV: 1965–1967
President of LWV: 1967–1969

[17] She has never produced a public affairs program or been employed by a broadcast station (TR. 487, 534).

Common Cause: Nashua Area Coordinator: 1971–1972

Cordinator of Confraternity of Christian Doctrine Program:St. Christopher Parish, Nashua: 1963–1967

Member of St. Christopher Parish School Board, St. Christopher Parish, Nashua: 1964–1967

Nashua Board of Education: 1964–1977

Nashua Board of Aldermen: 1977–1978

Nashua Cultural Diversity Committee: 1975–1976

Nashua Bicentennial Committee: Secretary of Committee: 1975–1976

Nashua Citizens' Advisory Committee, Secretary of Committee: A Committee appointed by Mayor on Urban Renewal issues: 1965–1967

Project Clearaway; program of Adult Learning Center of Nashua, Member of Board of Directors: 1977–1978

Right to Read Program: Advisory Committee Member: 1979–present

Greater Nashua Human Services Council: Board of Directors 1977–1979

Comment and Review Committee of Human Services Council: Member of Committee: 1977 to present

VOICE (Volunteers Organized in Community Education)—Member 1973 to present

Nashua Heart Fund: Chairperson of Ward 4, 1978 Heart Fund Drive

New Hampshire Advisory Council for Vocational Technical Education: Appointed by Governor of New Hampshire to serve from 1979 to 1982

New Hampshire Residential Conservation State Plan Committee: Advisory to Governor Council on Energy: task to develop a state plan for residential conservation: 1980 to present

Consumer Advisory Panel to New England Telephone Company: a panel consisting of consumer leaders from each New England State and Management from Telephone Company: 1979 to present

e. *Vincent F. Servello*

50. Servello, a 6.41% stockholder will serve as Marketing Director/Sales. He will devote full time, and a minimum of 40 hours a week to station management and operation (TR. 561). Servello, who has never worked at a radio station, will work with and be responsible to the

General Sales Manager.[18] His managerial duties will include in house data collection and dissemination tasks as well as the selling of radio advertising time on the local, regional and national level (TR. 601–604). His duties will include: studying and analyzing the community and relaying these findings to the General Sales Manager to facilitate his orientation of the sales staff concerning the make-up of the market; assisting the General Sales Manager in establishing realistic gross revenue goals based on market research and analysis; maintaining market files; maintaining statistical files (e.g., demographic breakdowns, market studies); monitoring the competition; preparing sales reports and seeking out clients, establishing new accounts, and servicing existing accounts.

51. Servello, who lives in Merrimack, was born January 2, 1946 in Filadelfia, Italy.[19] In 1956 his family moved to the United States and settled in Norwood, Massachusetts. He attended public schools in Norwood and graduated in 1965. He attended college in Chicago for two years and completed his B.A. at Suffolk University in 1969, graduating Magna Cum Laude. He received the college graduate scholarship award. With the aid of this and other scholarships, Servello attended the graduate school at Boston University, graduating with an M.A. in 1970. Servello also attended Simmons College in 1971, graduating with an M.S. During these school years he held a number of jobs.

52. After graduating from Simmons College in 1971, he was hired as the Assistant Director of the Nashua Public Library to work under Joseph G. Sakey. He shared this relationship through mid-summer 1971. Thereafter Servello had complete responsibility for running the Nashua Public Library with a staff in excess of 40 people. During this time the library moved to a substantially larger building in downtown Nashua. Shortly thereafter, Servello was named Director by the Board of Trustees. During his tenure as director, a number of programs and community activities were instituted to market the library as a more significant and meaningful part of the community. He resigned this position in August 1974.

53. In September 1974 Servello began work as the product line manager and sales manager for Dataroyal Incorporated, a manufacturer of turnkey minicomputer systems and line printers. He had responsibility for developing and implementing a complete market plan for numerous industries, especially distribution and retailing, and for all the associated sales activities. His territory included the United States and Canada and he was responsible for training regional sales people.

54. In November 1976 Servello went to work as a communication consultant for L.M. Ericsson, a firm involved in the marketing, installa-

[18] Servello explained his relationship with the General Sales Manager would be "more than subordinate superior . . . we would be working more as colleagues . . ." (TR. 601).

[19] Unless otherwise indicated, the biographical data relative to Servello is derived from Merrimack Ex. 10.

tion, and servicing of communication equipment, including telephone systems, intercom systems, and hospital paging systems. His territory included the north shore of Massachusetts and southern New Hampshire. In his first year he was the largest individual sales producer for the company. In his second year he became a Zone Sales Manager, supervising salespeople and responsible for a larger territory. In November 1978 Servello went with Teltronics Services, Inc. and opened their New England office. As Branch Manager, he supervised 10 employees and had complete responsibility for the office, including sales, administration, and operation.

55. In November 1979 Servello began work as Sales Manager in the Boston office of General Dynamics Communications Company, a nationwide company involved in marketing, installing, and servicing telephone systems and related communications systems. He supervised six sales people and handled some major communications systems. In August 1980, he became Senior Accounts Manager for Rolm, a telecommunications company, with offices in Lexington, Massachusetts.[20] Servello is also a part time computer and communications consultant. However, he plans to discontinue such consultancy if Merrimack is successful (TR. 570–571).

56. Servello's civic activities are as follows:

Nashua Rotary Club; Member: 1972–1974

N.E.E.D.S. Rehabilitation; Advisory Board: 1972–1974

Arts and Science Center; Board of Directors: 1973–1974

Arts and Science Center; Chairman Search Group: 1974

United Fund; Fund Group: 1973–1974

Boy Scouts of America; Fund Raiser: 1973

American Historical Association; Member: since 1969

American Philosophical Association; Member: since 1970

Maryknoll Missionary Fund; Member/Fund Raiser: since 1973

f. *Patricia M. Thurber*

57. As 6.41% stockholder and Minority Affairs Director, Patricia M. Thurber will devote full time[21] and a minimum of 40 hours a week to the

[20] The Presiding Judge, by Order (FCC 80M–1715), released September 18, 1980, accepted the amendment reporting this employment.

[21] Merrimack's application, as originally filed, committed Mrs. Thurber to 15 hours per week as the Minority Affairs Director. Her children subsequently left home and, prior to designation, she decided to devote full time to the stations (TR. 620–622).

stations' operations. Her managerial duties will entail the initiation and production, under the direction of the Station Manager and in conjunction with the Community Affairs Director and the News Director, of programming reflecting the needs and interests of the minorities of the community. She will conduct interviews and surveys, utilizing community contacts to ascertain needs of the minority constituency in the market area; develop programs which will reflect these needs and interests; and make sales presentations to prospective local and regional clients at the suggestion of the General Sales Manager or on her initiative (TR. 615–616).

58. Mrs. Thurber will have no employment other than with Merrimack. Although she intends to remain active in civic organizations, she will cease being a member of the Matthew Thornton Board and of the Norwell Home Board, listed, *infra*, (TR. 626).

59. Patricia Thurber was born May 25, 1932 in Riverside, Ontario, Canada.[22] A dual citizen of the United States and Canada, she is of French Canadian descent and a member of an historic family which settled on the Detroit River with the Missionaries and American Indians. She graduated with highest honors from St. Mary's Academy in Windson, Ontario, while pursuing her studies in advanced music at the Ursuline School of Music.

60. In 1953, Mrs. Thurber was awarded a B.A. in Social Work. Immediately after graduation from Marygrove College, Detroit, Michigan, she married and moved to Oxnard, California. After a brief period of work for the aircraft industry, she left to become a full time homemaker and mother. Living in California for four years, the young family resided in a Mexican-American neighborhood and became aware of the social and economic problems facing their neighbors in California.

61. Her husband's work then took the family to Indiana for three years, Washington, D. C. for one year, and then to Nashua, N.H. For several years, Mrs. Thurber volunteered her time to various local organizations: Brownies, Girl Scouts, PTA and Junior Women's Club. In the Junior Women's Club, she directed her efforts towards aiding the Nashua Children's Home.

62. She was active in the Nashua Theatre Guild and Nashua Actor-singers. In charge of the Publicity Committee for the Theatre Guild, she often wrote articles for local newspapers and handled programming arrangements. Her divorce in the mid-1960s made her aware of the problems of the woman alone, with children, and having to return to the work force. In 1967, Mrs. Thurber became the first Nashua Director of Operation HELP, a locally based, Community Action Program for the Office of Economic Opportunity. The program began as a referral service

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[22] Unless otherwise stated, the biographical data relative to Mrs. Thurber is derived from Merrimack Ex. 7.

linking the target community with various local agencies and organizations, and was later expanded to include Community Organization, Summer Camps, Day Care, Elderly Programs, Housing Social Services, Employment, and many others. As supervisor of the BISTA volunteers, she coordinated efforts in tutorial programs, arts, crafts, drama programs, job recruitment, adult basic education, information and educational programs for Spanish-speaking residents, housing surveys, tenants rights, and equal opportunity for all.

63. While working, Mrs. Thurber continued her education by attending summer sessions at Brandeis Unviersity in Community Social Problems as well as attending workshops, training programs and other professional seminars. Before leaving the project she initiated, funded and staffed a proposal for a Helpmobile Center to service Nashua and the surrounding towns.

64. By 1971, Mrs. Thurber had remarried a widower, a Nashua native, banker, and father of four teenage children. She dedicated her total efforts for a few years to the merged family of husband and seven young adults, organizing and managing their two homes. She is currently a member of: Nashua League of Craftman; Arts and Science Center; Nashua Country Club; Hampshire Hills Athletic Club; Friends of the Currier Gallery; Friends of the Boston Symphony; Unitarian Church; Audubon Society; Society for the Protection of N.H.
Forests; Strawberry Banke. Her past and present local activities are as follows:

United Way; Director: 1974–1975

Family Planning; Director: 1973

Nashua Day Care Center; Director: 1970–1971

Squam Lakes Science Center; Nashua area contact person: 1974–1976

Community Council; Director: 1974–1978

Good Cheer Society Visiting Nurse Association; Lifetime member; active until last year: 1974–present

Matthew Thornton Health Plan; Clerk of Corporation and presently Director: 1972–present

Norwell Home; Chairman and co-chairman social activities for the elderly ladies; Wrote and implemented pilot funded Occupational Therapy: 1975–present

65. More recently, Mrs. Thurber enrolled for a term in the Radcliffe Seminars Program pursuing a course of studies in her profession, social work.

g. *Selma R. Pastor*

66. As 6.41% stockholder and Women's Affairs Director, Mrs. Pastor will devote full time, and a minimum of 40 hours a week to her managerial duties[23], which will entail initiating and producing, under the direction of the Station Manager and in conjunction with the Community Affairs Director and the News Director, programming reflecting the needs and interests of the women in the market area.[24] The Station Manager will determine whether or not a program will be produced or broadcast (TR. 664). As Women's Affairs Director she will conduct interviews and surveys, and utilize community contacts to determine the information and other needs and interests of the women in the community; develop programs which will reflect these needs and interests; act as on-air facilitator, hosting panel discussions and moderating programs (TR. 648–649); compile a calendar of local, state and national events of interest to women and to women organizations; and make sales presentations to prospective local and regional clients at the suggestion of the General Sales Manager or on her own initiative (TR. 649).

67. Selma Pastor was born June 23, 1923, in Boston, Massachusetts.[25] That year, she moved with her family to Milton, Massachusetts. She attended public schools and graduated from high school in 1940. During and immediately following her secondary education, she worked at various part time jobs. In 1942, she completed the Junior Secretarial course at Burdett College in Boston, and until August, 1945 was employed as secretary to the office manager of a paint-manufacturing company (Merrimack Ex. 9, p. 1; TR. 185).

68. She graduated from Beth Israel Hospital School of Nursing, Boston in 1948. She was employed by the hospital as an operating room nurse, and passed the Massachusetts Board of Registration in Nursing examination in 1949. She also took courses for credit in creative writing, psychology, anthropology and sociology and, in 1950, spent three months travel-

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[23] Mrs. Pastor will continue to devote 2 hours a week as a Commissioner of the Nashua Housing Authority. Her term expires in March, 1983 (TR. 641, 647). Mrs. Pastor has also filed for re-election as a member of the New Hampshire House of Representatives, which meets on a biannual basis. It is in session three days a week for the first six months of the first year of the biennium. During this time, Mrs. Pastor will devote approximately 24.5 hours per week to this activity (20 hours per week plus a 1.5 hour daily commute) (TR. 642–645). Otherwise, she will devote five to six hours per month to it. She also intends to discontinue her part time employment (8–10 hours per week) with P.E. Fletcher Company, if Merrimack receives the AM and/or FM grant (TR. 646).

[24] Merrimack's application as originally filed committed Mrs. Pastor to 15 to 20 hours per week as the Women's Affair Director. However, her commitment was later increased to full time. The women's programs proposed remained the same, but her other duties (e.g., conducting surveys, making sales presentations, conducting interviews and building community contacts) were more fully described for the first time in Merrimack's December 15, 1978 amendment (TR. 657–659; Merrimack Ex. 2, Appendix A, p. 12).

[25] Unless otherwise indicated, the biographical data with respect to Mrs. Pastor was derived from Merrimack Ex. 8.

ling in Europe. After returning she continued in her operating-room position until early in 1951, when she was selected as instructor of student nurses in operating-room technique. She resigned in May, 1952.

69. In June, 1952, she married Bernard Pastor of Nashua. They established their home there, and Mrs. Pastor worked for a short time as a general-duty nurse at Nashua Memorial Hospital. She is the mother of four. Mr. Pastor acquired the P.E. Fletcher Corporation, a home-applicance dealership, in 1954. She served as vice-president and clerk, and worked part time doing some book-keeping and general office work as needed. Presently she is Customer Relations Supervisor for the corporation and still serves as clerk.

70. Mrs. Pastor has been involved in various volunteer activities in Nashua, including: Temple Beth Abraham, League of Women Voters, League of New Hampshire Craftsmen and Hadassah. She also participated in various groups with her children, i.e., Girl and Boy Scouts, art classes, YMCA and city-sponsored swimming programs.

71. In the late 60's and early 70's her interests focused on political and governmental issues. She worked with citizens' advisory committees regarding minority housing and low-income self-help, monitored the actions of city boards, and helped establish Nashua Family Planning.

72. In 1971, Mrs. Pastor was elected to a four-year term on the Nashua Board of Education. She was re-elected for a two-year term in 1975. She held a number of assignments during tenure on the Board.

73. In March 1978, she was appointed by the mayor of Nashua as a commissioner of the Nashua Housing Authority for a five-year term. She serves as vice-chairperson (TR. 641). Mrs. Pastor campaigned and was elected to the New Hampshire House of Representatives, Hillsborough District # 17, for the 1979–80 term. She is a member of the Committee on Municipal and County Government (TR. 642–5). Mrs. Pastor was also the Vice-chairperson of the Nashua City Democratic Committee from 1977–1979. She has been the Incorporator of the New Hampshire Charitable Trust since 1977.

74. None of the Merrimack principals who are to be integrated into the operations of the proposed stations have ever been employed by a broadcast station (TR. 347, 441, 487, 547, 577, 611, 665–66). Neither Merrimack nor any of its principals have any ownership interest in, or connection with any broadcast station, cable television system, newspaper or magazine or any form of mass communications (Merrimack Ex. 3, p. 1).

75. Sakey first became interested in September 1977 in applying for the deleted licenses of Stations WOTW (AM and FM), Nashua. He interested Shea and Servello[26] and the three met in the fall of 1977 to discuss the

[26] Servello could not join Merrimack in 1977 because of other business commitments. However, he later was free to join the group by acquiring the stock of Edith Carter who withdrew from the corporation. He conducted some leader interviews in 1978 (TR. 580–584).

matter. Sakey then interested Anderson who interested others (TR. 353, 355, 447–48, 450–52). The group decided to file applications for both the AM and FM facilities (TR. 358–59).[27] Sakey, Anderson, Shea and Pastor gathered the demographic information and all of the principals, with the exception of Servello who became a stockholder later, participated in the leader surveys, and in the formulation of the programming proposed, although Sakey ultimately decided the program times and percentage of news, public affairs and "all other" programs (TR. 365–67, 381–86, 465, 511–15, 530–34, 652–53, 659, 662, Merrimack Ex. 1, p. 3). The proposed positions of the integrated stockholders was agreed upon. Sakey drew up a list of positions, the stockholders wrote out their interests and gave them to Sakey who assigned job titles and drafted the final job descriptions, tailoring them to the backgrounds and interests of the stockholders (TR. 397–99, 425–26, 472–73, 495–96, 613–15).

76. Merrimack's proposal to have a full-time Community Affairs Director, Women's Affairs Director, and Minority Affairs Director does not depend on whether it receives both or only one of the two authorizations which it seeks[28] (TR. 426–27). As detailed, *supra*, Merrimack plans to employ Anderson, Pastor and Thurber in these positions, on a full-time basis, if it receives either the AM or the FM authorization (Merrimack Ex. 2, p. 2).[29]

77. Sakey and Shea prepared the estimated operating costs after meeting with various broadcast station owners and learning the revenues generated by WOTW (AM and FM) (TR. 379–380, 580–81).[30] In November 1978 Merrimack revised its three month operating costs in various categories. The integrated principals of Merrimack have discussed the probability that, if Merrimack is granted only one station, they may be faced with substantial decreases in their salaries. They are prepared to face such a prospect in order to acquire an ownership interest in a Nashua station (TR. 589–90).

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[27] Later counsel advised them that if they filed for both facilities, they had a better chance of winning one of them in a contested proceeding (TR. 358–63, 448–49).

[28] Similarly, Merrimack's proposal to have a part-time Educational Affairs Director does not depend on whether it is granted a permit for the AM and/or the FM stations (Merrimack Ex. 2, Appendix A, p. 1).

[29] Sakey was not aware of any AM or FM radio station which has either a full-time Women's Affairs Director, or a full-time Community Affairs Director, or a full-time Minority Affairs Director (TR. 428).

[30] Although Shea helped estimate these figures, he did not recall at hearing the projected construction costs and revenues for the FM station; he also did not recall the name of Merrimack's equipment supplier or the channel number (TR. 459, 463–464). And while Shea did know the percentage of the FM air time devoted to programming, commercials, and to public affairs and news, he did not recall the percentages of public affairs and news programming originally proposed in Merrimack's FM application (TR. 465–468). Similarly, while Mrs. Anderson reviewed the applications in early 1978, she did not recall at hearing the channel number, the name of Merrimack's equipment supplier, or its projected revenues and costs (TR. 513–519).

78. Merrimack proposes to install an emergency power generator to be used for the AM or FM station or for both (Merrimack Ex. 17, TR. 197; Merrimack Ex. 18, TR. 199).

II. Sunrise Broadcasting Corp. (Sunrise)

79. Sunrise is a New Hampshire corporation formed for the purpose of applying for the facilities of WOTW and WOTW-FM in Nashua, New Hampshire. There are 300 shares of authorized, no-par, common voting stock. When subscriptions previously authorized by the Board of Directors are fully met, there will be 200 shares of issued stock, distributed as follows (Sunrise Ex. 1):

NAME AND RESIDENCE	*OFFICE HELD*	*DIRECTOR*	*NUMBER OF SHARES HELD AND/OR SUBSCRIBED*	*PERCENTAGE*
Barbara E. Tamposi 176 Coburn Woods Nashua, N.H. 03063	President	Yes	48	24
James N. Tamposi, Jr. 36 Indian Rock Road Nashua, N.H. 03060	Secretary/ Vice President	No	46	23
Samuel A. Tamposi, Jr. 352 Pine Hill Road Hollis, N.H. 03049	Treasurer	Yes	46	23
Lee C. White 429 N. Street, S.W. Washington, D.C. 20024		Yes	22	11
Phil David Fine 3 Charles River Square Boston, MA 02114		No	22	11
Robert J. Saner, II 1615 21st Street, N.W. Washington, D.C. 20009		No	16	8

a. *Barbara E. Tamposi*

80. Barbara E. Tamposi, President and 24% stockholder of Sunrise, will be General Manager of the station(s).[31] She will oversee all aspects of

[31] Sunrise plans to hire an experienced station manager (TR. 731-32). However, day-to-day operating policy will be set by the general manager, Barbara Tamposi (TR. 887). James and Samuel Tamposi will be directly accountable to the station manager (TR. 861-62, 1057).

the broadcast operation, including programming, news, sales, engineering, ascertainment and compliance with the Commission's Rules. She will supervise all station personnel. As general manager and chief executive officer, she will be directly responsible to the Board of Directors (Sunrise Ex. 6, p. 1, TR. 211).

81. Miss Tamposi was born in Nashua, New Hampshire on February 13, 1955.[32] She resided in Nashua until January 1973, again in the summer's of 1973 through 1977[33], and from the summer of 1978 to the present (TR. 205).

82. Miss Tamposi attended Nashua High School from the fall of 1969 to early 1973. She spent the last semester of her senior year (January 1973 through June 1973) in the Experiment in International Living, during which time she lived in Italy and attended the Liceo Artistico Italiano in Teramo. She speaks Italian fluently. Miss Tamposi was graduated from high school in June, 1973.

83. From September 1973 through June 1974, Miss Tamposi attended the University of Vermont in Burlington, where she resided on campus. From January to May of that year, she worked as a volunteer disc jockey and Classical Music Program Coordinator at Station WRUV in Burlington. She selected all the music played on her show and answered questions over the air about classical music. She had three hours of program time a week and drew heavily on her previous twelve years of training in classical music (TR. 849).

84. In September 1974, Miss Tamposi transferred to the University of New Hampshire in Durham (approximately 45–50 miles from Nashua) where she was graduated *cum laude* in 1978 with a B.A. in political science. While attending the University, she resided in Rye, New Market, and Lee, New Hampshire (TR. 849–850). From 1975–1977 she was a member of the University's Debating Team; in the spring of 1974 she joined the Adopted Grandparents Program; and from 1976–1977 she was a member of the University of New Hampshire Affirmative Action Committee, which oversaw the implementation of Title IX in the collegiate athletic program.

85. Miss Tamposi held jobs during her years at college. In the summer of 1975, she worked as a paste-up artist on a newspaper owned by the 1590 Broadcasting Corporation, a Nashua corporation that also owns a radio station. In 1976 she spent the spring working as an intern in the Spaulding Youth Center in Tilton, New Hampshire, approximately 60 miles north of Nashua (TR. 852).

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[32] Unless otherwise indicated, the biographical data relative to Barbara E. Tamposi is derived from Sunrise Ex. 2.

[33] As detailed, *infra*, Miss Tamposi was away at college during the 1973–78 period.

86. From January through May 1978, Miss Tamposi was employed in Washington, D. C. as an intern at the United States Chamber of Commerce, where she worked on legislative matters under the supervision of a public affairs lawyer. She resided in Arlington, Virginia during this 5 month period (TR. 851). Her duties included writing analyses of pending legislative proposals for the purposes of lobbying and providing information to members and setting up meetings between Congressmen and Chamber members.

87. From May 1978 to October 1979, Miss Tamposi was employed by Samuel A. Tamposi Realtors as a real estate broker. She has been self-employed as a real estate broker in Nashua since October 1979 (TR. 676). She is involved in commercial and residential real estate development, investment and sales, and in land speculation and appraisal. Her office is in Nashua.[34]

88. On February 26, 1980, Miss Tamposi was elected by the 16th District to be their Representative to the General Court, the New Hampshire state legislature. She serves on the Committee for Commerce and Consumer Affairs, helping her approximately 10,000 constituents with questions and in their dealings with the state government. She was re-elected to a second term on November 4, 1980.

89. Miss Tamposi is a member of the Southern New Hampshire Chamber of Commerce. In December, 1979 she was elected a Director of the Nashua Chamber of Commerce. She has been a member of the Nashua Business and Professional Women's Association since April 1979 and was chosen the 1979 New Hampshire Young Career Woman of the Year; in that capacity, she represented New Hampshire at the Association's national convention (TR. 852). Miss Tamposi has also been a member of the Southern New Hampshire Association of Commerce and Industry since April 1978, and presently serves on the Chairman's Council and on the Government Task Force. She became a director of the Girl's Club of Greater Nashua in the summer of 1978 and has served as its President and Chairwoman of the Board since May 1980 (TR. 853–854). In April 1980, Miss Tamposi was elected as a Trustee of the Arts and Science Center in Nashua.

90. Miss Tamposi has the following business and financial interests: (1) since November 1979, a 16.7% interest in Tamposi Family Investment Properties; (2) since January 1980, a 5.6% interest in CNT Investment Properties; (3) since January 1980, a 5.6% interest in Peter-Sam Investment Properties; and (4) since 1979, a 12.5% interest in Bly Farm Properties (TR. 961–966).

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[34] Her father, brother (Samuel A. Tamposi, Jr.) and others work at the same office. However, they function independently of one another as independent contractors (TR. 867–68).

b. *Samuel A. Tamposi, Jr.*

91. Samuel A. Tamposi, Jr., Treasurer and 23% stockholder of Sunrise, will serve as Sales Manager of the station(s). He will be in charge of all commercial aspects of the operation, including supervision of the sales staff, coordination of relations with advertisers, and the setting of station policy concerning the sale of broadcast time (Sunrise Ex. 6, p. 6).[35]

92. Samuel Tamposi was born in Nashua on September 5, 1952. Except as detailed, *infra*, he lived there until 1979, when he moved to Hollis, New Hampshire, which is .2 mile from the Nashua city limits.[36]

93. Samuel Tamposi attended and lived at Governor Dummer Academy in Byfield, Massachusetts from September 1967 to June 1971 when he graduated cum laude (TR. 946).

94. In September 1971 Samuel Tamposi enrolled and resided on campus at Dartmouth College in Hanover, New Hampshire (TR. 947). At the end of his first year, he was inducted into the U.S. Army and served from June 1972 until March 1974. He received the Army Commendation Medal, the Good Conduct Medal, the National Defense Medal and the Expert Rifleman's Badge. While overseas, he took classes with the University of Maryland's extension course.

95. Samuel Tamposi re-enrolled at Dartmouth following his discharge in March, 1974. By taking an overload of courses every term and by attending school continously through two summers, he was able to graduate *cum laude* in August, 1975. After college he went to work as a real estate salesman in the offices of his father, Samuel A. Tamposi, Sr. He is now self-employed as an independent real estate broker and is involved in industrial, commercial and residential real estate development and investments. He is Vice-President, director and ⅓ stockholder in Forest, Tamposi and Nash, Inc., a relatively inactive brokerage concern (TR. 967–968). He operates through partnerships which hold interests in the development of real estate and the construction of buildings (TR. 882). His ownership in Nashua real estate investments include: (1) since 1975, a 25% interest in Buckmeadow Realty; (2) since 1976, a 50% interest in partnership with Q. Peter Nash; (3) since 1976, a 33.3% interest in Souhegan Woods; (4) since 1977, a 100% interest in Samuel A. Tamposi, Jr. Real Estate; (5) since 1977, a 25% interest in Woodstock Properties; and (6) since 1977, a 50% interest in Heniker Properties (TR. 949–954). He also has the following business and financial interests (TR. 956–966).

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[35] Samuel Tamposi expressed the view that Sunrise had not formulated any policy concerning the use of discounts in the sale of broadcast time. He was not familiar with the Commission's rules concerning the reporting of trade out arrangements and did not know the meaning of the term "promotional consideration" (TR. 887–89).

[36] Except as otherwise indicated, the biographical data relative to Samuel Tamposi is predicated upon Sunrise Ex. 3.

NAME AND NATURE OF BUSINESS	*NATURE OF INTERESTS/DATES*
Walt-Sam Realty (real estate venture)	50% (Circa April, 1978)
Tam-Char, Inc. (bulldozing)	President, a Director and 27% stockholder (circa February–March, 1980)
Northeast SMNS Industries Properties (real estate development)	40%; November, 1979[979]
Tamposi Family Investment Properties	1/6th interest, November, 1979
CNT Investment Properties (real estate development, leasing, buying and selling of land and buildings)	1/6th of 1/3; January, 1980
Peter-Sam Investment Properties (real estate, owning, buying, selling, leasing of land and buildings)	1/6th of 1/3; January, 1980
Maine Properties (real estate)	1/3 interest; August, 1979
Auburn Realty (land investment)	25%; 1979
Bly Farm Properties (condominium development in Concord, New Hampshire)	12.5%; 1979

He intends to continue ownership in all of his business enterprises and will devote 3 to 5 hours per week to them if the AM and/or FM applications are granted (TR. 879, 881).

96. Samuel Tamposi is active with the Nashua Jaycees. He has chaired various committees since 1977 and contributes about 5 hours per week of his time. He was State Director of the Jaycees for 1979–80. He also contributes 2 hours per week to the Nashua Rotary West and one hour

per week to the Boy's Club of Nashua, which he serves as Director of the Community and Public Relations Committee and Chairman of the Self-Evaluation Committee (TR. 948). He also participates in fund-raising activities of both groups.

97. Samuel Tamposi is a member of the Nashua Chamber of Commerce and the New Hampshire Home Builders Association. He was a delegate to the 65th Annual Meeting of the U.S. Chamber of Commerce. He also devotes 3 hours per month to the Dartmouth Club of Nashua, 1 hour per month to the Nashua Jaycee-Teen and works with the YMCA Club, the Easter Seals Telethon and various local and state political campaigns. He intends to continue these activities if Sunrise receives the AM and/or FM grant (TR. 877–879).

c. *James N. Tamposi, Jr.*

98. James N. Tamposi, Jr., Vice President, Secretary and 23% stockholder of Sunrise, will be Director of News and Public Affairs at the station(s), supervising the work of the on-the-air news announcers and responsible for the selection and preparation of all news and public affairs programs (TR. 981). He will serve as liaison between the station(s) and the communities and civic organizations in the service area, in order to keep abreast of the problems and issues of greatest concern to them.[38] He is the cousin of Barbara and Samuel A. Tamposi, Jr., who are brother and sister.

99. James Tamposi was born in Nashua on March 5, 1956. He lived there continuously until 1974, when he was graduated from Nashua High School. He was a member of the Student Council, and was a member of the National Honor Society for two years and was listed in "Who's Who Among American High School Students."[39]

100. From September 1974 to June 1977, James Tamposi attended the Whitemore School of Business and Economics at the University of New Hampshire in Durham where he resided on campus (TR. 1042). He was graduated with honors in 1977 with a B.S. degree in Administration. He was a member of the Pi Gamma Nu, a social science honor society, and Psi Epsilon, a business and economics honor society.

101. He is an independent real estate contractor at Stoudt Realty, a Nashua firm owned by Lane D. Stoudt. He has been employed there and has resided in Nashua since his graduation from college in 1977.

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[38] James Tamposi expressed the view that his job would also include that of director of community relations and probably sports director (Sunrise Ex. 6, p. 1, TR. 1055, 1061). Barbara Tamposi, however, acknowledged that Sunrise's applications do not provide for directors of community relations or sports (TR. 759). Samuel Tamposi wasn't sure whether the position of Community Relations Director was necessary (TR. 973–74).

[39] Except as otherwise indicated, the biographical data relative to James N. Tamposi, Jr. is derived from Sunrise Ex. 5.

102. James Tamposi has had a 50% interest in a number of partnerships with friends and relatives to acquire condominium units for rental and ultimate sale. His partners included Ron Boucher, Mark Langlais, Douglas Tamposi, John Landry, and Paul Tringoson, all of whom are residents of Nashua or vicinity. He also is participating with Samuel Tamposi, Jr. and Barbara Tamposi or with a trust that they are a part of in the purchase of 16 condominium units, some of which have been constructed and some of which are in the process of being constructed. Some of the units are rented now while others may be sold before rental. James and Samuel Tamposi, Jr. also recently bought some land in Lincolnia, New Hampshire on a 50-50 basis (TR. 1046–51). James Tamposi will devote approximately three hours a week to the management of his investments (TR. 984–85).

103. Mr. Tamposi is active in several realtors' associations, including the National Association of Realtors, the New Hampshire Association of Realtors, the Nashua Board of Realtors and the Southern New Hampshire Multiple Listing Service. He is an active member of the Nashua Chamber of Commerce, contributing about one hour per week to this activity (Tr. 979).

104. In September 1980, Mr. Tamposi enrolled at and began attending, full-time, Boston College Law School. Should Sunrise be granted a license before the completion of Mr. Tamposi's legal education, he will quit law school and fulfill his commitment to full-time participation in station operations (TR. 1061–62).[40]

105. All three integrated principals, Barbara E. Tamposi, Samuel A. Tamposi, Jr. and James N. Tamposi, Jr., will work full-time at both of the stations, if both their applications are granted, if only one application is granted, they will work full-time at that station. They estimate that this will require a minimum commitment of 40 hours a week. The other stockholders will not be integrated into the station(s) operations.

106. Neither Sunrise, nor any of its officers, directors or stockholders has an interest in any AM, FM or television broadcast station (or applications), cable television system, newspaper or magazine publication or any form of mass communications (Sunrise Ex. 5, p. 2).

107. Sunrise proposes to install an emergency power generator to be used for the AM or FM station or both (Sunrise Ex. 1).

108. Barbara Tamposi learned of the availability of the stations from her father, Samuel Tamposi, Sr., in December, 1977. He had learned of this opportunity from Warren Rudman who had, in turn, learned of it from Lee C. White. Samuel Tamposi, Sr. told Rudman that he was not inter-

[40] The Presiding Judge, by *Memorandum Opinion and Order*, FCC 80M–1645, released September 11, 1980, accepted an amendment reporting his enrollment in law school.

ested in the project but that his children might be interested in it (TR. 689, 901–02).

109. Barbara, her brother, Samuel A. Tamposi, Jr., her cousin, James N. Tamposi, were part of the original group which decided to file the applications. At the time of filing they were each to have a 10% ownership interest and other relatives and business associates from the Nashua area were to hold a 30% interest, with Lee C. White and Phil D. Fine, who are not Nashua residents, owning 20% each (TR. 687–91). Later, in December 1978, the other Nashua area principles withdrew and Barbara, Samuel and James increased their interest to as listed, *supra;* White and Fine each decreased their interest from 20% to 11% and R. J. Saner, II, an associate of theirs, acquired his 8% interest (TR. 749–50, 753–56). It was at this time that Barbara committed to be full-time General Manager, Samuel to be full-time sales manager[41] and James to be full-time News/Public Affairs Director.[42] The Tamposis were aware, at the time, that they increased their stock interest and integration commitment that the Sunrise applications would be enhanced by greater integration by those having larger interests (TR. 759–61).[43] All three Tamposis participated in the community leaders survey, contributed to the Sunrise programming proposal and the determination of the amounts of news and public affairs programming proposed (TR. 701–03, 711–721, 728–29, 1001–03, 1026–29, 1063–65).[44]

110. Samuel Tamposi participated in the development of the financial proposal for the stations.[45] He was also active in the preparation of the

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[41] Samuel Tamposi believes that his father wants him to take over his real estate business some day; however, his father has not asked him to take over the business (TR. 971–72). Samuel Tamposi intends to retain his various real estate interests, to which he devotes full-time, if Sunrise is successful. He will discontinue his real estate developments, however, in order to work full-time at this station. He estimated he would then devote about 3 to 5 hours per week to his real estate interests (TR. 877–881).

[42] James Tamposi will discontinue his involvement in his current real estate ventures (TR. 983–84).

[43] Barbara Tamposi explained that the decision to increase the stock interest of the three Tamposis was based upon the belief that their stock ownership should be related to the extent of their commitment to participate on a full-time basis at the station(s) (TR. 755–56). She presently works approximately 40 hours per week at her real estate interests. If Sunrise is awareded one or both facilities, she would reduce the time spent on those investments to time available—during the weekend or evenings (TR. 869–70).

[44] Barbara Tamposi consulted with Edward Winton, an experienced broadcaster, with whom Sunrise had an oral agreement relative to consultancy, concerning staffing and personnel (TR. 740–748). She adequately explained this consultancy with Winton, and no lack of candor is raised relative to this matter. Similarly, she and Samuel Tamposi adequately explained Sunrise's relationship with Richard Balsbough and the unsuccessful efforts to have him participate as a stockholder and general manager of the proposed station(s) (TR. 731–32, 817–27, 857–58, 936–943).

[45] Barbara Tamposi initially claimed participation in the development of Sunrise's financial proposal (Sunrise Ex. 7, p. 3). Later, she acknowledged that she had no part in the preparation of cost estimates or revenue projections, nor did she assist in arranging the bank loan. She did not know the construction costs or revenues projected in Sunrise's FM application, the affect on Sunrise's revenue estimates should Sunrise receive only one of the grants, or the name of Sunrise's equipment supplier (TR. 707–711, 719–721).

engineering portions of Sunrise's applications, meeting with William King, an engineer, to discuss their proposed transmitter site and to learn what would need to be done to upgrade WOTW's existing facilities for the new stations. Samuel and James Tamposi also met with representatives of the Federal Aviation Administration in Burlington, Massachusetts to discuss possible transmitter sites (TR. 708–09, 828, 874–75, 904, 980, 990–96).

111. White, Fine and Saner, who are not to be integrated into the day-to-day operation of the station(s), are attorneys. Both White and Fine have been interested in the proposal since its inception and have played an active roll in guiding the group in the prosecution of the applications (Community Ex. 10–12, TR 764–77). Fine had recommended the group file for both the AM and FM facilities, since the stations, in his view, were economically dependent on each other (TR 892–903). These three principals are not residents of Nashua.

III. Gateway Broadcasting Associates (Gateway)

112. Gateway is a limited partnership comprised of four individuals and structured as follows (Gateway Ex. 2, p. 2):

NAME AND RESIDENCE	*NATURE OF PARTNERSHIP INTEREST*	*PERCENTAGE OF OWNERSHIP OF PARTNERSHIP*
Mario DiCarlo 56 Beecher Street Newton Center, Massachusetts	General Partner	70%
Norman M. Kruglak 51 Brentwood Circle Needham, Massachusetts	General Partner	10%
Augusta Hornblower Wenuches Trail Groton, Massachusetts	Limited Partner	10%
Ada Harkaway 4 Whitegate Drive Nashua, New Hampshire	Limited Partner	10%

a. *Mario DiCarlo,* the 70% general partner and proposed full time general manager, was born January 18, 1922, the youngest son of Italian immigrant parents. He presently resides at 56 Beecher Place, Newton, Massachusetts. He has resided in Newton all of his life, except for his military service.[46] Newton is outside the predicted 0.5 mV/m contour of

[46] Unless otherwise indicated, the biographical data relative to Mario DiCarlo is derived from Gateway Ex. 3.

the proposed AM station, and outside the 1.0 mV/m contour of the FM proposal (TR 1175–76). He is not presently a member of any Nashua civic organization (TR 1180). He will commute daily to Nashua if Gateway is successful in obtaining a station.[47]

113. DiCarlo attended the Newton public schools and graduated from Newton High School in 1940. At the age of 15 years he ran his own landscaping business while still in school. After graduating from high school, he attended the National Youth Administration School at Quoddy, Maine, where he studied aircraft and equipment maintenance. He was elected Chairman of the Student Council.

114. In 1943, he joined the U.S. Marine Corps. Following boot camp, he was sent to radio and radar school where he developed an early interest in radio. After successfully completing courses as a radio and radar technician he saw service at Guadacanal as radar technician, responsible for the maintenance and service of technical radar equipment. After one year, he was returned to Camp Le Jeune for further training in communications. He was honorably discharged from the Marine Corps. in April, 1946.

115. After his discharge from the Marine Corps., DiCarlo attended the Stockbridge School of Agriculture at the University of Massachusetts in Amherst, Massachusetts. He has spent most of his mature life in business with his brothers (TR 1166). He is a Director and 25% owner of DiCarlo Brothers, Inc., whose business is site development and excavating. In this position he went out on sites, arranged financing, administered the office, planning, estimating and selling. He is presently employed by DiCarlo Brothers, Inc., with a salary, but with very few duties over the past five years. He is the last remaining brother in the business and is in the process of liquidating assets and turning them over to the next generation. Until that is completed, he is kept on the payroll as a courtesy (TR 1158–61).

116. He is Director of Newton South Co-Op Bank and was formerly the Executive Vice-President of the bank (TR 1164). Aside from DiCarlo Brothers, Inc., he is not presently employed (TR 1172).[48]

117. DiCarlo was president and director of Kotcom Broadcasting, Inc., licensee of Station WCOD-FM, Hyannis, Massachusetts during the period of August, 1973 to July, 1977. He helped guide the station in financial matters. He never owned stock in the station, but held a convertible debenture, which was not converted. He considered himself a creditor. The station paid him back the loan when the station was sold in July,

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[47] Driving time is approximately 30–40 minutes from Newton (TR 1127, 1206). In heavy traffic the driving time could be one hour and 10 minutes. However, he can adjust his travel time by leaving or returning other than during the rush hour periods (TR 1283–84).

[48] He has been a director and stockholder of the Walnut Trading Company and Ace Rental Equipment, Inc. since 1958 and is an officer and director of LaSell Realty Co. (TR 1167–69).

1977. He was an investor, and did not work at the station on a daily basis (TR 1154–57).

118. DiCarlo has never been, and is not presently, a member of any civic organizations in Nashua (TR 1180).

119. As noted, *supra*, DiCarlo will be the general manager and devote full time to the operations of the proposed station(s). His duties will include those general, supervisory aspects of all station operations, inclusive of finances, personnel, programming and public relations (Gateway Ex. 3, p.6).

120. As the general manager and managing partner of Gateway, DiCarlo will devote a minimum of 40 hours per week; closer to 60 or 70 hours per week, since his concept of full time is usually more than 40 hours a week (TR 1094, 1149, 1181–83).

121. He would not know how to separate his fulltime duties between the AM and FM stations. No specific formula has been established for the number of hours to be devoted to each station on a weekly basis by the partners. DiCarlo would devote fulltime attention to both stations if granted, and if only the FM or AM station is awarded to Gateway he would devote fulltime to such station. (TR 1149–53).

122. b. *Norman Kruglak*, the 10% general partner and proposed full time general sales manager, was born July 13, 1920 in Chelsea, Massachusetts. He resides at 51 Brentwood Circle, Needham, Massachusetts, which is approximately 18 miles west of Boston, Massachusetts.[49] Needham is 45–50 minutes away from Nashua, and is located outside the 0.5 mV/m and 1 mV/m contours, respectively, of Gateway's AM and FM proposals (TR 1256–57). Kruglak has never resided in Nashua, but in the latter 1950's he worked in Lowell, which is the next town away from Nashua, and he went to Nashua frequently during that time. He was not in Nashua during the 1970s. Kruglak intends to move to Nashua in the event of a grant (TR 1257–58).

123. Kruglak spent his formative years attending schools in the Chelsea school system, except for two years attending New York City schools. During his senior year in high school he was on the staff of the yearbook and became interested in journalism and communications. After graduating from high school he worked one year before entering Boston University Evening College of Commerce. Upon completing two and one-half years of a six-year degree course in business management and accounting, he was called to military service with the U.S. Army Air Corps. in 1942. Following military service in Italy, he was discharged in September, 1945. He resumed his studies at Boston University, attending courses

[49] Unless otherwise indicated, the biographical data relative to Norman Kruglak is derived from Gateway Ex. 4.

during the evening hours while working days. He graduated in 1949 with a bachelor degree in business administration.

124. In 1958, the principal of Lowell Scrap, Iron and Metal Co., Inc., Mr. Nelson Noble, acquired the license of Station WILD, Boston, Massachusetts. He asked Kruglak to devote time to setting up bookkeeping systems and other controls for the station and provide him with periodical financial statements. Within the next two years, Kruglak was working fulltime at Station WILD, as assistant manager and comptroller. His responsibilities centered on the management of the total accounting function, preparation of financial reports and state/federal returns. He was also responsible for record keeping and the filing of certain FCC reports.

125. In September, 1966, Station WILD was sold to Dynamic Broadcasting Corporation. Kruglak was asked to remain with the station during the transition of ownership. Within 30 days, he was offered the management position at the station for a six-month trial period. He was then promoted to permanent general manager and was made a vice president of Dynamic Broadcasting Corporation. He had full responsibilities for all department operations. During this time, Kruglak actively participated in the New England Broadcasting Association, attending meetings and functions.

126. Kruglak resigned his position as general manager in 1969, and helped train and prepare his successor to assume reponsibilities. He remained with the station under the ownership of Sheridan Broadcasting Corp. as the general sales manager until May, 1977. He was responsible for the total sales efforts, including the training and supervision of individual sales persons and originating and implementing station promotions.

127. As noted, *supra*, Kruglak will be the general sales manager of the proposed station(s) and will direct the day-to-day activities in the areas of sales. He will devote fulltime to the station(s), a minimum of 40 hours weekly (Gateway Ex. 4, p.6). DiCarlo approached Kruglak specifically to be a general partner and the general sales manager (TR 1094, 1215–16). Kruglak explained that Gateway has applied for both the AM and FM stations and intends to construct and operate both stations, if granted. He will devote fulltime to both, and devote whatever time is required for the FM station (TR 1252).

128. As more fully discussed, *infra*, from April 1978 to April 1979, Kruglak was employed by Boston Phoenix (Boston, Massachusetts) as Sales Manager for the Sack Theater Show Guide. For the period April 1979 through the present, he has been employed by Golden Food and Beverage Association (Boston, Massachusetts) as sales representative of coffee products (Gateway Ex. 11).

129. c. *Augusta Hornblower,* a 10% limited partner, was born June 6, 1948, in Boston, Massachusetts[50] She presently resides in Groton, Massachusetts (TR 1602). She does not propose to relocate to Nashua. She is not a member of any Nashua community organization (TR 1620).

130. Miss Hornblower, at an early age, displayed an interest in political memorabilia and campaign participation. She was a surrogate speaker for various candidates and a member of the Debating Society throughout her high school years. She wrote for the school paper and, in her senior year, was elected editor of the yearbook.

131. Miss Hornblower was one of the first 13 women to attend Babson College in Wellesley, Massachusetts. She was elected as President of the Business Economics Society, and was a member of the Society for the Advancement of Management. In January, 1971, she received her Bachelor of Science degree in Business Administration.

132. In 1965, Governor John Volpe presented Miss Hornblower with the Paul Revere Patriot award. She was nominated Outstanding Young Woman of the Year in 1972. She has appeared in the sixth and seventh editions of Who's Who in American Politics, and has also been nominated to the American Biographical Institute. Miss Hornblower is a notary public. She is presently employed in the Massachusetts Office of Energy Resources in the Commonwealth's Fuel Oil Marketing Demonstration Program.

133. Augusta Hornblower will participate fulltime in the operation of the proposed station(s) in traffic and sales (Gateway Ex. 5, p. 5). There was discussion of her role as fulltime traffic/sales person. She feels comfortable in this role because of her background in sales.[51] She will report to DiCarlo as general manager of the stations (TR 1607, 1616–17).

134. d. *Ada Harkaway,* a 10% limited partner, was born March 20, 1927, in Netwark, New Jersey. She resides presently at 4 Whitegate Drive, Nashua, New Hampshire, and has resided in Nashua for the past 33 years.[52]

135. Mrs. Harkaway attended schools in Newark, New Jersey. Prior to her marriage in 1947, she was employed as a dental assistant. Her husband is now Chief Justice of the Nashua District Court. In 1957, she became interested in and actively involved in city, state and national politics. In 1958, she was active in the formation of "The Lawyers Wives of New Hampshire", the auxiliary body of the New Hampshire Bar Association. She was elected the first secretary of that organization.

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[50] Unless otherwise indicated, the biographical data relative to Augusta Hornblower is derived from Gateway Ex. 5.

[51] Hornblower has no experience in traffic and has never sold radio time or worked at a broadcast station (TR 1607–08).

[52] Unless otherwise indicated, the biographical data relative to Ada Harkaway is derived from Gateway Ex. 6.

136. Mrs. Harkaway was the chairman of the Mothers March of Dimes in 1959. And, in 1962, she was appointed to the New Hampshire Advisory Committee on Civil Rights. In 1964, she was appointed to the Executive Board of the Community Action Committee and was a Director of the Fair Housing Commission from 1965 to 1967. From 1963 to 1972, she was the office manager of a local law firm.

137. In 1968, Mrs. Harkaway was invited, along with six other women, to participate in a "working women's viewpoint" on Radio Station WOTW's program "Impact". As a result of her initial participation, she was invited back a number of times and eventually became a weekly regular on the program as a volunteer until 1972.

138. She was also active in the formation of the ARts and Science Center, a non-profit organization providing culture and arts to the public. In 1973, Mrs. Harkaway was elected to the Nashua Memorial Hospital Advisory Board, which she still serves; and since November, 1979 has been on the Board of Trustees of the hospital. Previously, in 1972, she became advisory member of the Marquis Biographical Library Society.

139. Mrs. Harkaway has been the recipient of various awards and certificates for community works; and listed in: National Social Directory, Who's Who of American Women (1972–73), Who's Who in the East, World's Who's Who of Women (1973), Notable Americans of the Bicentennial Era (1976), and the 1976–78 International Who's Who of Intellectuals.

140. Ada Harkaway, a 10% limited partner, proposes fulltime participation (40 hours per week) in the operation of the station(s) as the public affairs/news director. Her duties will include general supervision and participation in the preparation, scheduling and presentation of public affairs and news programs (Gateway Ex. 6, p. 4).

141. She will report to DiCarlo who will have the final say in the day-to-day operations of the stations. Mrs. Harkaway discussed with DiCarlo her production of news and public affairs programs and believes that there will be no problems with her decisions in this regard. She intends to devote 40 hours a week to these duties (TR 1333–36).

(e) *Formation of Partnership and Understanding Re: Its Terms*

142. Mario DiCarlo first learned of the availability of the stations in the late Fall/early Winter of 1977 from Dana Cott, the general manager and majority stockholder of Station WCOD-FM, Hyannis, Massachusetts. DiCarlo initially had the idea of putting together a group to apply for the stations in November or December 1977. From the very beginning, DiCarlo intended to apply for both stations. He was aware that the Commission gives credit for the integration of owners in station management and that prior broadcasting experience was also considered. (TR 1090–94).

143. Early in December 1977, DiCarlo called Kruglak and asked him if he would be interested in attempting to acquire the licenses of the WOTW

facilities, and during the conversation, he suggested that Kruglak would be station sales manager (TR 1213–16). DiCarlo offered Kruglak a 10% interest in the partnership during this discussion. Kruglak accepted the offer in that same conversation and did not discuss the 10% figure. (TR 1264) DiCarlo also mentioned Harkaway and Hornblower as possible participants in the venture in that conversation, but did not mention the extent of their participation (TR 1216, 1301–02).

144. DiCarlo had known Kruglak for 5–6 years prior to becoming interested in applying for the stations. (TR 1092) However, the only financial enterprise Kruglak and DiCarlo have ever been engaged in together is the present Gateway proposal (TR 1305). At the time DiCarlo first spoke to Kruglak about applying for the stations, Kruglak did not know Harkaway and had known Hornblower for only a brief time. (TR 1216)[53]

145. Miss Hornblower was first interested in the Nashua radio facilities in the fall of 1977, through her acquaintance with DiCarlo. He advised her of the situation and consideration for involvement in a group which subsequently became Gateway (TR 1602–03). She understood that Gateway would file for both the AM and FM stations (TR 1603–04).

146. Mrs. Harkaway was first contacted by Mario DiCarlo about joining in a venture for the Nashua radio stations and she agreed to be a limited partner (TR 1343–44; Gateway Ex. 10, p. 14).

147. From the outset, it was DiCarlo's intention that the applicant would be a limited partnership (TR 1091, 1096). DiCarlo told his local attorney that he wanted an entity formed as a limited partnership and the attorney "presented" him with what eventually became the Articles of Limited Partnership of Gateway. (Gateway Ex. 10; TR 1113–14)

148. The only provision DiCarlo specified to the lawyer that he wanted in the partnership agreement was that he was to have a 70% interest and each of the other partners would have a 10% interest. (TR 1286–87) DiCarlo decided the percentage interests of the other partners. He decided on 10% interests because he believed they could become involved to that extent without jeopardizing their financial security. He wanted to limit their financial exposure. (TR 1111)

149. All the Gateway partners signed the Articles of Limited Partnership as DiCarlo initially presented it to them. DiCarlo did not remember discussing any of the provisions with any of the partners. (TR 1208)

150. DiCarlo gave the proposed Articles of Limited Partnership to Kruglak in DiCarlo's office sometime during the first half of December 1977. (TR 1290) Kruglak read and reviewed the document. He signed it without speaking to anyone and without discussing any of its provisions

[53] Harkaway did not know, and had never met, either Hornblower or Kruglak prior to the time they became invovled in the Gateway project. (TR 1324, 1349)

with DiCarlo or making any suggestions for revisions. (TR 1217–21, 1265) The first time Kruglak knew that Harkaway and Hornblower each had 10% interests or that DiCarlo had a 70% interest was when he signed the agreement. (TR 1302) That was also the first time he knew he would be a general partner and that Harkaway and Hornblower would be limited partners. (TR 1303)

151. DiCarlo next showed Hornblower the proposed Gateway Articles of Limited Partnership. That was the first time she had discussed her percentage share with him.[54] (TR 1322, 1348–49) That was also the first time she learned what the other partners' shares would be. (TR 1349, 1625–26) DiCarlo gave the agreement to Hornblower in his office and she later returned it, signed. (TR 1291–92, 1604) The only question Hornblower ever raised with DiCarlo was the participation of Kruglak. She didn't understand why Kruglak was to be a general partner. (TR 1606) DiCarlo responded that there was nothing to worry about. She construed this as DiCarlo's expression of confidence in Kruglak. (TR 1604–05) DiCarlo and Hornblower knew each other well. He had been impressed by her educational background and forthrightness. (TR 1094)

152. The last partner to sign was Harkaway. (TR 1291) DiCarlo gave the proposed Articles of Limited Partnership to Harkaway in her home in January, 1978. She read the Articles to her husband, who is a judge, over the telephone and then she signed it. (TR 1292–93, 1344) She did not discuss any of its terms with DiCarlo. (TR 1350) DiCarlo had known Harkaway for 25 years. He contacted her because of her Nashua residence and her reputation, interest in the community and radio exterience. (TR 1094–95)

153. Article 8.1 of the Articles of Limited Partnership provides as follows (Gateway Ex. 10, p. 5):

> 8.1 *Responsibility of General Partners*
>
> The General Partners shall have full, exclusive and complete discretion in the management and control of the business and affairs of the Partnership for the purposes hereinstated and shall make all decisions affecting the Partnership affairs and business. The General Partners shall manage and control the affairs and business of the Partnership and shall carry out the purposes of the Partnership as set forth herein.

Equally important, Article 13 provides (Gateway Ex. 10, p. 11):

> No Limited Partner shall be personally liable for any of the debts of the Partnership or any of the losses thereof beyond the amounts

[54] Hornblower had previously discussed her interest with DiCarlo, but this had been in terms of her capital contribution, not her percentage interest. (TR 1605)

contributed by him to the capital of the Partnership, anything to the contrary herein expressed or implied notwithstanding. No Limited Partner, as such, shall take part in the management of the business or transact any business for the Partnership. No Limited Partner, as such, shall have the power to sign for, or to bind the Partnership. No Limited Partner shall be entitled to the return of his contribution except to the extent provided for in this agreement.

154. It is DiCarlo's and Kruglak's understanding that under Article 8.1 of the Articles of Limited Partnership that the general partners have full control and exclusive and complete discretion in the management of the business affairs of the partnership (TR 1141, 1240). The final decision-making authority would reside with DiCarlo, as the general manager of the stations (TR 1244). Both Hornblower and Harkaway acknowledged that they would have no decision-making authority in the management of the partnership (TR 1323, 1606).

155. However, DiCarlo expressed the view that all are equal partners in the conduct of policy-making decisions (TR 1112). According to him, there never was an intention to be arbitrary or capricious about any decisions that have to be made, since, in his view, the big factor was an association of persons that he really considered full partners in their freedom to make decisions; individuals that could really contribute and be responsible (TR 1111-1114).

156. It was Kruglak's understanding that Gateway's two general partners have full, exclusive and complete discretion in the management and control of the business affairs of the partnership. This has always been his understanding. (TR 1240–41)

157. Kruglak went on to explain, however, that he understands the provision in Article 13 of the Articles of Limited Partnership, that no limited partner shall take part in the management of the business of the partnership, to mean that a limited partner cannot act to bind the partnership in transactions with third parties. He noted that specific duties have been assigned to each member of the partnership; the duties, the titles and the responsibilities of each are all part of the management of the stations. He related that there has been a meeting of the minds, with each one contributing his or her thoughts of what they are going to do relative to station operation. Kruglak could not perceive how Article 13 of the Articles of Limited Partnership could change that relationship; what has happened in the past is going to happen in the future (TR 1241–43).

158. Harkaway understands Article 13 to mean that she would not take part in management. She had this understanding at the time she signed the agreement. (TR 1323)

159. However, she believes that, as a limited partner, she would have something to say about the way the stations would be run, especially in her area, but that she would not be the "controller" (TR 1323).

160. Hornblower understands that, under the terms of the Gateway Articles of Limited Partnership, as a limited partner, she would not have any decision-making authority. (TR 1606)

161. Article 8.3 of the Articles of Limited Partnership provides (Gateway Ex. 10, p. 6):

> 8.3 *General Authority*
>
> Except as herein expressly restricted, the General Partners shall have all rights and powers permitted under the provisions of The Uniform Limited Partnership Act of the State of Massachusetts. The General Partners shall act by a majority.

162. DiCarlo had no understanding as to how the requirement in Article 8.3 that the general partners must act "by a majority" would apply to Gateway, since there are 2 general partners. (TR 1142–43) Kruglak understood this provision to mean that approval by both general partners was required. He had never discussed with DiCarlo what would happen if the two general partners had a disagreement. (TR 1240–41)

163. There are other provisions of the Articles of Limited Partnership where DiCarlo and Kruglak had different understandings as to their meaning.[55] However, these provisions do not impact upon the authority of the partners in the management of the partnership and, therefore, are of no decisional significance.

164. The capitalization of Gateway is $250,000. DiCarlo has delegated himself to make a $175,000 capital contribution and the other three partners are obligated for $25,000 each. (Gateway Ex. 10, pp. 14, 15)

165. The original Articles of Limited Partnership required all capital contributions to be made on or before January 7, 1978. As amended, the agreement required each partner to pay 10% of his capital commitment on or before March 15, 1978 with the balance payable 10 days after being called (Gateway Ex. 10, Article 6.3, pp. 4 and 15). At the time of the hearing, Kruglak, Hornblower and Harkaway had contributed nothing to the partnership account. (TR 1188, 1236, 1255, 1341–1342, 1617–1618) DiCarlo had paid in $25,000 representing 10% of the total capital commitment and 14.3% of DiCarlo's commitment. (TR 1187–1188)

166. However, each of the other partners has committed himself or herself to a pro rata share (10%), or $25,000, to the partnership. Kruglak understands that he is committed and intends to make his $25,000 capital contribution if Gateway is awarded the AM and/or FM station. (TR 1255) Miss Hornblower's understanding with the partners is that she will make

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[55] For example, whether Article 5.2, which provides that the partnership can be terminated, requires all the partners to agree (TR 1132–35, 1235–36) or as to the meaning of the term "payout" in Article 7.1 (TR 1135–37, 1235–37).

her $25,000 contribution (TR 1618); and Mrs. Harkaway's understanding is the same. (TR 1341–42)

167. Kruglak has incurred out-of-pocket expenses in connection with his activities relative to the Gateway applications. He expects to be repaid for those expenses by the partnership; in fact, he has received some reimbursement of expenses. (TR 1308)

168. DiCarlo related that there is an understanding that if Gateway is unsuccessful in obtaining a station, the other partners will pay to him their pro rata share of expenses incurred. (TR 1190) Kruglak agreed that he is responsible for 10% of those expenses. (TR 1255–56, 1309–10) Hornblower feels an obligation for her pro rata share of expenses, and has had informal discussions with DiCarlo about this matter. She made it clear in her discussions with DiCarlo that she felt an obligation to pay her proportionate share of expenses, and questioned when she would have to do so. (TR 1618, 1624–25) DiCarlo said not to worry about it right now. (TR 1619) Harkaway has not discussed the payment of a pro rata share of expenses if Gateway is unsuccessful. (TR 1342)

169. DiCarlo is the sole guarantor of Gateway's $150,000 bank loan. According to DiCarlo, in the event of a default on the loan, the other three partners have orally agreed to contribute their pro rata share towards his liability. (TR 1183–1184) the other three partners, however, do not share this understanding. Hornblower was aware of the loan's existence, but said no determination has been made whether or not the remaining three partners will pay their pro rata share upon default. (TR 1620) Kruglak denied that he had such an understanding and Harkaway, who was not aware of the loan's existence, said there had been no discussion with her concerning DiCarlo's obligation to repay the loan. (TR 1256, 1342–1343)[56]

(f) *Other Matters Re The Gateway Proposal*

170. Gateway proposes the installation of auxiliary power equipment (Gateway Ex. 9, p. 2).

171. Neither Gateway nor any of its partners has an interest in any broadcast stations or other communications media. (TR 1209, 1318, 1337) Kruglak's broadcast experience is set forth, *supra*. Neither Hornblower nor Harkaway have any broadcast experience. DiCarlo's former relationship with a Cape Cod station is detailed, *supra*.

172. It was DiCarlo who interested the other three partners in the enterprise. DiCarlo, Kruglak and Hornblower conducted the community leader survey and all four partners participated in the general public survey. (TR 1103, 1226–28, 1328–29, 1608, 1622) All four partners had input

[56] The partnership agreement provides that the limited partners (Harkaway and Hornblower) are liable for the debts or losses of the partnership only to the extent of "the amounts contributed by him to the capital of the partnership..." (Gateway, Ex. 10, Article XIII, p. 11)

into the proposed programming and participated in the decisions concerning the number of hours of operation, the financial projections and the program formats. (TR 1102, 1117–19, 1127, 1205–06, 1230–34, 1254, 1310–12, 1332, 1339, 1611) DiCarlo assigned staff positions, arranged the bank loan and investigated the site availability. DiCarlo and Kruglak determined the program times and percentages. (TR 1121–25, 1231–34, 1332–33, 1352, 1610) The partners had 3 or 4 meetings where they assisted in the preparation of their proposals. Understandably, at the time of hearing, the partners were not totally familiar with every specific aspect of the proposals; for example, Kruglak and Hornblower did not know the name of Gateway's equipment supplier; neither Hornblower nor Harkaway knew whether Gateway proposes to use an emergency power generator and Harkaway did not know the number of public service announcements proposed by Gateway, its projected revenue or first quarter costs. (TR 1254, 1258–59, 1340–41, 1346–47, 1610, 1622–23)

g. *Section 1.65 Issue*

173. On May 16, 1980, Gateway filed a Petition for Leave to Amend with accompanying amendments to its applications reporting intervening employment changes by Norman Kruglak and Augusta Hornblower, and a change in Hornblower's residence. (TR 1320; Gateway Ex. 11)[57] This petition was granted and the accompanying amendment accepted by *Order* (FCC 80M–904), released June 3, 1980.[58]

174. Community Service, on June 3, 1980, filed its Petition to Enlarge Issues requesting a Rule 1.65 issue against Gateway, alleging the untimely reporting of the aforementioned changes of employment of Kruglak and Hornblower, and the latter's change in residence. (TR 1077)

175. During the July 2, 1980 hearing session in this proceeding, as memorialized by *Memorandum Opinion and Order* (FCC 80M–1159), released July 8, 1980, the Presiding Judge granted enlargement to the extent that the comparative issue encompasses questions of possible Rule 1.65 violations by Gateway, and what impact, if any, such behavior would have on Gateway's comparative posture. (TR 1078–79)

176. The Gateway applications were filed on January 16, 1978. At that time Kruglak was unemployed, but some months later, in April 1978, he

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[57] Gateway Ex. 11 was erroneously marked as Gateway Ex. 1 and received in evidence as Gateway Ex. 1. (TR 1315)

[58] The amendment reported the following: (1) *Norman M. Kruglak:* From April, 1978—April, 1979, Mr. Kruglak was employed by Boston Phoenix, Boston, Massachusetts. Sales Manager, Sack Theatre Show Guide. From April, 1979—present, Mr. Kruglak has been employed by Golden Food and Beverage Assoc., Boston Massachusetts. Sales Representative of coffee products. (2) *Augusta Hornblower.* From March, 1978 to Nobember, 1978, Miss Hornblower worked (on a commission basis) for the Bronson for Congress Committee as a fund raiser. Danvers, Massachusetts. From March, 1979—present, Miss Hornblower has been employed by the Massachusetts Office of Energy Resources, Boston, Massachusetts, Manager of oil heat retrofit program. In July, 1979, Miss Hornblower changed her residence address to Wenuches Trial, Groton, Massachusetts.

took a job with the Boston Phoenix in Boston, Massachusetts, as sales manager of the Sack Theatre Show Guide. He worked there until April, 1979, when he assumed his present position as a sales representative of coffee products for Golden Food and Beverage Assoc. in Boston, Massachusetts. These employment positions were not reported by way of amendment to Gateway applications until May 16, 1980. (TR 1214–15, 1320; Gateway Ex. 11)

177. Kruglak acknowledged that he had been advised in 1978 through correspondence from counsel that major changes in application information should be reported. However, he understood that major changes constituted anything materially affecting his commitment in the original application and operation of the stations. He did not understand that he had an obligation to advise the Commission of changes in his employment status. (TR 1247–49, 1261)

178. When employed by Boston Phoenix he advised his employer of his interest and association with Gateway and he further advised his employer that, in the event Gateway was the successful applicant, he would work fulltime for Gateway. Employment was proffered to him on these conditions. Upon accepting employment with Golden Food and Beverage Assoc., Kruglak advised his employer, Marvin Golden, of his interest and association with Gateway, an applicant for radio stations in Nashua. He advised that, in the event Gateway was the successful applicant, he would work fulltime for Gateway, and leave his employment. He was hired under these circumstances. (TR 1316–17)

179. If Gateway were granted one or the other of the Nashua stations, Kruglak will terminate his present employment and become general sales manager for the station(s). (TR 1318)

180. In Gateway's amendment to its applications, filed on May 16, 1980, it was reported that Augusta Hornblower took a job on a commission basis from March, 1978 to November, 1978, with the Bronson for Congress Committee as a fund raiser in Danvers, Massachusetts; that in March, 1979, she became employed in her present position in the Massachusetts Office of Energy Resources in Boston, Massachusetts; and that in July, 1979, she changed her residence from Watertown to Groton, Massachusetts. (Gateway Ex. 11; TR 1320, 1615)

181. Hornblower explained that DiCarlo was aware of her employment with the Bronson for Congress Committee, which was temporary. (TR 1616) She was first advised of the requirement to report changes in employment and residence within six months of the hearing. However, she did not think these changes were very important. (TR 1614–16)

182. DiCarlo acknowledged that he was aware of Kruglak's employment at Boston Phoenix at the time. DiCarlo also became aware of Kruglak's employment at Golden Food and Beverage Assoc. shortly after such employment commenced in April, 1979. DiCarlo did not attach signifi-

cance in Kruglak's employment changes because his agreement with Gateway always existed. (TR 1192–96)

183. DiCarlo was aware of Hornblower's work with the Bronson for Congress Committee at the time she was there (TR 1194–95): and he was aware of her employment in the Massachusetts Office of Energy Resources at the time. (TR 1195) DiCarlo was also aware that Hornblower had changed her residence to Groton, Massachusetts; he helped her refurbish the house. (TR 1196)

184. A letter from counsel in October, requested DiCarlo to check with the Gateway partners for any and all changes in occupational, business and financial interests as set forth in Section II, Table II of the application (TR 1198–99) DiCarlo discussed this matter with the partners, but he felt no real changes were made which would affect a partner's commitment to Gateway. DiCarlo did not advise counsel of these changes until he learned that their interpretation was wrong. (TR 1198–1201) The decision to file the amendment was based on a discussion with counsel. The partnership has not established any procedures for reporting changed informated to the Commission. (TR 1247–51, 1615)

185. DiCarlo explained that if an important change, such as moving out of state or taking a job which would have precluded fulfilling the commitment to the applicant, that would be of some significance. But, since Kruglak's and Hornblower's interests in the applications always seemed firm and a steadfast commitment, he did not realize that need to report. (TR1197–98)

IV. Community Service Broadcasting of Nashua, Inc.

186. Community Service Broadcasting of Nashua, Inc. (Community is a New Hampshire corporation whose registered office is Peterborough, New Hampshire. It was created for the express purpose of filing an application with the Commission for a construction permit to construct and operate a new FM broadcast station on 106 Mc/s, Channel 292A, at Nashua, New Hampshire. The organization meeting was held on November 9, 1977, and the record of organization filed with the State of New Hampshire. On November 16, 1977, the State issued a certificate of incorporation to Community, and, on January 16, 1978, it filed its application with the Commission for a new FM station (Community Ex. 1, p. 1).

187. The corporation is authorized to issue 100 shares of Class A common voting stock without par value and 200 shares of Class B common non voting stock without par value. The two classes of stock were created in order to insure that the stockholders who were to participate in the operation of the station received voting shares (Community Ex. 1, p. 1).[59]

[59] The only difference between Class A and Class B stock is that Class A carries with it voting rights while Class B does not. Class A and B are weighted equally in apportioning dividends and proceeds upon sale and dissolution.

188. The Articles of Agreement provide that no stockholder shall have preemptive or preferential rights of subscription or purchase of any securities of the corporation and the Bylaws provide that no holders of shares of the stock of the corporation shall sell or transfer the stock without first offering it to the corporation for purchase (Community Ex. 1, pp. 1–2).

189. The corporation's Bylaws provide for not less than three nor more than eleven directors, a president, a treasurer, a clerk, and such other officers and agents as the board of directors may from time to time appoint (Community Ex. 1, p. 2).

190. The following is a list of the officers, directors, and stockholders showing the number of shares paid-in as of May 1, 1980 and subscribed for and the percentages of voting stock interest represented thereby when all subscription are paid in (Community Ex. 1, pp. 2–3).

NAME AND ADDRESS	*OFFICE HELD*	*NUMBER OF SHARES PAID-IN*		*NUMBER OF SHARES SUBSCRIBED*		*VOTING PERCENTAGE*
		A	*B*	*A*	*B*	
Peter Ferrand 355 Lake St. Nashua, New Hampshire 03060	President	23	0	0	17	23%
Jane Bangert 11 Danbury Road Nashua, New Hampshire 03060	Vice President Director	20	3	0	17	20%
Edward Lithgow 9 Prospect St. Peterborough, New Hampshire 03458	Treasurer Director	15	8	0	17	15%
Jean Wallin 3 Durham St. Nashua, New Hampshire 03060	Clerk Director	15	8	0	17	15%
James T. Walsh 84½ Main St. Peterborough, New Hampshire 03458	Director	9	14	0	17	9%

191. The original three members of the group which led to Community's formation were Peter Ferrand, James T. Walsh, and Edward Bambauer, all of whom resided outside of Nashua at the time of incorporation. (TR 1364–75) Ferrand was familiar with the WOTW facilities in Nashua due to his employment with a radio section in Keene, New Hampshire. Ferrand was also aware of the Commission's concern with the goal of superior

service tothe communities of broadcast licensees. As a result, he wanted to add members to the group who had diverse backgrounds, some media experience and familiarity with the Nashua area (Community Ex. 1, p. 3).

192. In the initial meeting, it was decided by Ferrand and Walsh tohave a total of seven stockholders who would also serve as directors of the corporation. Bambauer was not included due to his residence in Massachusetts and other commitments, but was to remain as a director and to assist with financial planning. It was also decided to have at least two women in the group and that each stockholder would participate in the operation of the station (Community Ex. 1, pp. 3–4).

193. Subsequently, Martin Nankin, Jean Wallin, Gale Hennessy, and Edward Lithgow joined the group. All of these people had some medica experience and Wallin and Lithgow had actually worked at radio stations in New Hampshire. They also were all familiar with the Nashua area. Thus, at the time Community filed its application on January 16, 1978, there were six stockholders and seven directors. Subsequently, Jane Solomon (now Bangert) agreed to subscribe and participate and she was added to the group in February, 1978. She also had broadcast experience in Nashua and is a long-time resident of that City (Community Ex. 1, p. 4).

a. *Peter R. Ferrand*

194. *Peter Ferrand* (president, director, and 23% stockholder) will be the fulltime general manager and program director of the FM station and responsible for its day-to-day operation.[60] His duties will involve overall planning and supervision of the entire station's operation. He will perform administrative tasks similar to those of any head of an organization, e.g., budget planning, personnel adjustments, determination of the station's market placement, overall sales policy, and facilities management. As program director, he will design and carry-out the station's on-air format in conjunction with the community relations director and program committee.[61] (Community Ex. 5, p. 1) He will solicit advertising, supervise the announcers and perform air shifts when the station is short staffed. (TR. 1399–1401)

195. If Community is successful in obtaining the FM station, Mr. Ferrand would continue to devote four hours weekly to the Nashua Area Radio Club and two hours weekly to the Manchester Users Group. (TR. 1428)

196. Peter R. Ferrand, a resident of Nashua, New Hampshire, was born on April 28, 1952, in Bayside, Borough of Queens, New York City.[62]

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[60] In response to interrogatories, Ferrand proposed to devote a minimum of 35 hours per week to these duties. When questioned during the hearing, he made clear that he expects to devote 60 hours a week to the station. (TR 1383, 1430)

[61] Ferrand is a number of the program committee.

[62] Except as otherwise indicated, the biographical data relative to Peter Ferrand is derived from Community Ex. 2, pp. 1–3.

He attended Public School 152 and Inwood Junior High School in Manhattan, and graduated with an Academic diploma from the Bronx High School of Science in 1968. He was the winner of a New York Regent's Scholarship, and, at the age of sixteen, obtained his First Class Radiotelephone License.

197. Ferrand graduated from Herbert H. Lehman College, City University of New York, in May 1973 with a B.A. in mass communications. In addition to the speech, journalism, and related courses, he took course work in business, social, and political science.

198. Ferrand began his broadcast career in Lehman College by joining the college radio facility (WHCB/WLCB) upon enrollment, and continued to be associated with the stations until graduation. He served as a member of the executive board, which was responsible for the overall supervision of the operation, as well as the planning and construction of an entire new studio complex. He also programmed and hosted a thrice-weekly air shift and numerous newscasts.

199. During June and July of 1969, he was employed by WHN Radio in New York City as Summer Relief Engineer, and he was the sole operator of the station for most of the overnight shift. Other responsibilities included news editing and production. Professional on-the-air experience began at Station WRNW, Mt. Kisco, New York, in November 1969. He worked as program host and news commentator.

200. Ferrand's next broadcast employment was from September 1972 to March 1973 with Station WRKL, New City, New York where he worked ten to twenty hours a week doing program hosting, news and a variety of other on-air assignments. For the three years between December 1970 and December 1973, he worked for the New York City Department of Traffic as a radio operator. The City maintained a variety of telephone and radio channels, and Mr. Ferrand, who was in charge of the overnight shift, was responsible for all types of emergency and routine city business communications. He would be in touch with City personnel on the scene as well as the mayor or other city officials in order to handle these situations. He also prepared press releases and broadcast actuality feeds for use by the New York press, as required.

201. Ferrand was then employed by Taylor Aviation, Inc., licensee of Station WGHT Bath and Station WEKT Hammondsport, New York, for the period January, 1974, to April, 1974. He was responsible for all phases of program announcing, news, and production, as well as design, operation, installation and maintenance of station facilities and apparatus. Ferrand worked from June, 1974, to December, 1977, for Station WIBX/WIBQ, Utica, New York as a newscaster, announcer, and engineer. He handled a variety of news, announcing, advertising, and technical assignments during his employment, including being master of ceremonies at

many local functions. He also was the supervisor to a Junior Achievement group and a number of college interns.

202. Ferrand was employed by Station WENT Gloversville, New York as an announcer and newscaster from May, 1975, to January, 1977. Working parttime, from 20 to 30 hours a week, he performed the tasks of program host, newscaster, and field reporter. He was the employed by Stations WKNE/WNBX-FM, Keene, New Hampshire as a salesman and announcer from January, 1977, to January, 1978.[63] He was responsible for creating sales promotions, commercial production, program announcing, news gathering, and reporting. While in Keene, Ferrand was president and then vice-president of the Keene Radio Amateur Society.

203. Thereafter, Ferrand was employed by Tufts Radio and Television, Inc., in the position of Service Manager. He was responsible for all phases of service department operations. Tufts repairs communications, amateur, audiophile, television, computers, and other equipment, as well as providing station design and troubleshooting consulting services for clients. At the time of the hearing, he was unemployed but did parttime announcing at a Lowell, Massachusetts, radio station.

204. Ferrand has been an active amateur radio operator since 1964, and he has, since residing in Nashua, been a member of the Nashua Area Radio Club, and assisted in the coordination of several Civil Defense Commuinications exercises.

b. *Jane A. Bangert*

205. Jane A. Bangert, vice-president, director, and 20% stockholder, will be the fulltime assistant general manager and news/public affairs/community relations director.[64] Her duties will include overall responsibility for news and public affairs programming and community relations efforts, including the ascertainment of needs and problems in the service area. She will also assist Ferrand in the areas of assessing the station's response to issues of public importance, determining the marketing impact of the station on the community, and the assessment of personnel performance. In Ferrand's absence, Bangert will fulfill the duties of general manager (Community Ex. 5, pp. 1–2; TR 1381).[65] In the event

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[63] Ferrand resided in West Swanzey, New Hampshire, which is approximately 45 miles from Nashua during the period January, 1972–June, 1978, when he moved to Nashua. (TR 1357)

[64] Bangert is also a member of the Program Committee. Bangert assumed the duties of the former news/public affairs director, Jean R. Wallin, when Wallin was appointed Chairman of the New Hampshire State Liquor Commission in March, 1980 (TR 1444) There was no discussion of her increasing her Class A voting stock when she assumed these additional duties. (TR 1473–74)

[65] No decision has been made as to how Bangert will divide her time among her duties as assistant general manager, news and public affairs director and community relations director. (TR 1401–02, 1418, 1472)

Community is successful in obtaining the FM station, she will resign her present position. (TR 1476)

206. Jane A. Bangert,[66] a resident of Nashua, New Hampshire, was born April 24, 1935, in Chicago, Illinois. She attended Hirsch High School in Chicago from 1948 to 1952. She was elected to the National Honor Society, graduated as salutatorian of her class, and received numerous awards for her school activities. From 1952 to 1956, she attended the University of Illinois where she graduated cum laude with a Bachelor of Science degree in Commerce and Business Administration. While at the University, she was named to Bronze Table (University Honors), Beta Gamma Sigma (Commerce Honor Society), Alpha Lam Delta (Honors), Phi Kappa Phi, and Sigma Iota Epsilon (honorary management fraternity). She was employed by the University as a statistics laboratory assistant and in varying positions as interviewer, supervisor, and director of marketing research projects contracted through the University. She later earned her Masters degree in Business Administration at Northeastern University in 1973.

207. In 1954 she was married to the late Robert M. Solomon. In 1956, she moved to Fort Wayne, Indiana, where she was employed as a market research statistician with the General Electric Company but left the company in 1957 prior to the birth of her first child.

208. Her husband's work took her to Minneapolis, Minnesota, in 1960 where she lived for the next six years. While living there, she worked as a nursery school teacher and was active in various civic affairs.

209. She made her permanent home in Nashua, New Hampshire, in 1966. From 1966 to 1968, she was employed as a kindergarten teacher. In 1968, she accepted a teaching position with Daniel Webster College where she remained for the next six years. While at the College, she served in a variety of positions, including Director of Continuing Education, Associate Professor of Business Administration, Curriculum Coordinator, and Assistant Dean of Women. In 1970, she accepted a parttime position with the 1590 Broadcasting System (WSMN Radio) and initiated an education news program which won the New Hampshire Council for Better Schools award. She continued at the station until 1975 and became education director. In addition to her weekly broadcast, for which she was both editor and commentator, Bangert also assisted with spot news reports and covered the 1972 Democratic National Convention in Miami. In 1972, she was awarded the Junior Women's Club Award to Broadcasters.

210. In 1975, she left the college and radio station to assume her present position as Director of Personnel and Special Services for the Nashua

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[66] Unless otherwise indicated, the biographical data relative to Jane A. Bangert is derived from Community Ex. 2, pp. 5–7. As noted, *infra*, Bangert, prior to her marriage, in January 1980, was Jane A. Solomon.

School District where she has responsibility for over 1100 employees and a budget of some twelve million dollars. In addition to her personnel responsibilities, she prepares all news releases and reports. She married her present husband in January, 1980.

211. During her years in New Hampshire, Bangert has served as Director and Clerk of the Corporation for the Southern New Hampshire Association of Business and Industry; Director and President of Nashua Fresh Air Camp; Director of the New Hampshire Council for Better Schools; Member and Vice-chair-person of ESEA Title IV State Advisory Board; Member, Personnel Manager Association; Member, New Hampshire School Volunteers Advisory Board; Member, Nashua Airport Advisory Committee; State Legislator; Member, Business & Professional Women's Club; Member, Junior Women's Club; Member, New Hampshire House Appropriations Committee; Member, Unitarian-Universalist Church Executive Committee; Secretary-Treasurer, Nashua Citizens Advisory Committee; Member and officer, Nashua College Club; Advisory Board, Nashua Association of Retarded Children Sheltered Workshop; League of Women Voters, UNICEF Chairperson; and Officer, Women's Auxiliary of the Arts and Science Center.

212. She also has held positions in political campaigns at the local, state, and national level. Bangert served as the New Hampshire delegate to the national Miluski Commission which formulated the rules for the Democratic primaries and was selected for its drafting committee. She was Hillsborough County Democratic chairperson and a member of the New Hampshire Democratic State Committee and its Executive Committee.

213. She has been named one of the outstanding educators in America, one of the outstanding young women in America, and, in 1975, was selected as the Business & Professional Women's Woman of Achievement.

c. *Edward Lithgow*

214. Edward Lithgow, treasurer, director and 15% stockholder and member of the Program Committee, will be the fulltime local sales manager and sports director. As treasurer, Lithgow is responsible for the financial affairs of the corporation. As local sales manager, he will prepare advertising programs and packages to meet the specific needs of advertisers and call on them regularly. He will assign territories to other sales persons and be responsible for their performance. As sports director, Lithgow will be in contact with elements of the local sports community to provide for coverage of their events. He will design program formats for sports coverage and supervise their preparation. He will personally do play-by-play announcing for area high school football and basketball games. (Community Ex. 5, p. 2)

215. Edward J. Lithgow, Jr., a resident of Peterborough, New Hampshire, was born on November 20, 1925, at Kearny, New Jersey.[67] Lithgow attended Kearny High School and graduated in 1947. He is a 1955 graduate of Springfield College, Massachusetts, with a Bachelor of Science degree in Physical Education. College radio Station WSRB at Springfield provided his first exposure to sports broadcasting as play-by-play announcer for baseball and basketball, along with membership in the communications club.

216. Lithgow entered the United States Navy in January, 1943, and served until January, 1946, as a Radioman second class assigned to carrier duty in the Pacific Theater. Following service discharge, he was employed by P. Ballentine & Sons in Newark, New Jersey, in production and, for two years thereafter, he worked for the North Jersey Distributorship of Willys-Overland in Newark as service assistant.

217. In 1955, Lithgow started his coaching and teaching career as Director of Athletics and Physical Education and coach of three varsity sports, at Walpole High School, New Hampshire. He left this position in 1960 to assume similar duties at Deer Park, New York. He returned to New Hampshire in 1961 and served until 1966 as Director of Physical Education and Athletics and coach of basketball and soccer of Peterborough High School. From September, 1966 to July, 1970, he was the Director of Physical Education at Franklin Pierce College, New Hampshire. While on the staff at Franklin Pierce and shortly thereafter, he worked with his wife in the nursing home business in Peterborough, New Hampshire.

218. In 1972, Lithgow assumed the duties of sports director and salesman at Radio Station WSCV/WSLE, Peterborough, New Hampshire, and provided the area with broadcasts of high school baseball, basketball and soccer. While with Stations WSCV/WSLE, he sold advertising time in the Nashua area. (TR 1486) He was associated with the stations until 1976, with the exception of a short break in 1974–75 when he worked for the Rhode Island Oceaneers of the American Soccer League broadcasting play-by-play over Stations WICE, Providence and WKRI in Warwick, Rhode Island, and one season as football announcer at Station WKBK, Keene, New Hampshire, in the Fall of 1976.

219. Lithgow is a member of the Knights of Columbus Council, the American Legion in the Town of Peterborough, and an usher at St. Peter's Roman Catholic Church. He has served in various capacities on community and state youth programs, such as a three year stint on Town recreation commission, coach of Pee-Wee baseball, basketball, hockey and soccer

[67] Unless otherwise indicated, the biographical data with respect to Edward J. Lithgow, Jr., is derived from Community Ex. 2, pp. 9–10. Peterborough is located 25–30 miles from Nashua. Lithgow has no plans to moving to Nashua. (TR 1485–87)

programs. In the high school age group, he coached Babe Ruth Baseball and broadcast the New Hampshire Vermont Lions charity soccer game along with past involvement with Boy Scouts of America as a local director.

220. Lithgow's present position is that of assistant athletic director and basketball coach at Nathaniel Hawthorne College in Antril, New Hampshire. (TR 1496) He has not advised the college that he would leave if Community is successful in obtaining the station. (TR 1496–99).

221. Lithgow is the sole owner of a hauling business in Peterborough. He presently devotes five hours per week to this business, but probably would turn the business over to his son if Community is successful in obtaining the station. Lithgow is also one-half owner, with his wife, of a nursing home in Peterborough. (TR 1483–90)[68]

(d) *Martin Nankin*

222. Martin Nankin, director, 9% stockholder and member of the business committee, (TR 1521–23), proposes to devote at least 20 hours a week to his position as national regional sales director. As such, he will call on representatives of national/regional advertisers to solicit their purchase of the station's advertising time. He will also be responsible for retaining others to sell such advertising and participate in the production of commercials (Community Ex. 5, p. 2)

223. As detailed fully, *infra*, a serious question has been raised as to whether the commitment of Nankin to devote a minimum of 20 hours a week to the proposed FM station should be credited.

224. Martin Nankin, a resident of Jaffrey Center, New Hampshire, was born November 11, 1945, in New York City.[69] He graduated from Sheepshead Bay High School in 1962. With the aid of several merit scholarships, he attended Cornell University and graduated in 1966. He then attended, with the aid of a tuition scholarship, New York University Graduate School of Business Administration. He completed his course work in 1968 and received his Masters of Business Administration upon completion of his thesis in 1973. Also, in 1973, Nankin received a Masters of Education from Antioch University in New Hampshire.

225. Nankin began his work career in 1966 with Young and Rubican as a media trainee. He became a broadcast and print buyer working initially in New York and later in the San Francisco and Los Angeles offices. The accounts he handled included General Foods, Proctor and Gamble, Chrysler Plymouth, and Kaiser Steel. In 1969, Nankin left Young and

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[68] Lithgow does not devote any time to the nursing home, acknowledging that he erred in response to interrogatories when he asserted that he spent 5–10 hours at the home. (TR 1489–91)

[69] Unless othewise indicated, the biographical data relative to Martin Nankin is derived from Community Ex. 2, pp. 16–17. Jaffrey Center is located 25–30 miles from Nashua. Nankin has no present intention to move to Nashua. (TR 1544–45)

Rubican and became involved in independent film production. He joined Lennen and Newell as an agency producer in 1970. He was involved in producing General Cigar, McCormack Spices, Florida Citrus and Kaiser Aluminum radio and television commercials.

226. In 1971, Nankin became a parttime faculty member of the State University of New York. His courses were designed and delivered to prison populations, high school drop-outs and those in substance abuse programs.

227. As he became more active in education, he sought a Masters Degree from Antioch. Upon completing his program, he remained in New England Center as the admissions director and an instructor in management and audio-visual techniques.

228. In 1976, Nankin resigned from Antioch and became an employee of Communities for People, Inc., a non-profit agency providing community based care for people with special needs. In 1978, Nankin formed Environments for Human Services, Inc., of which he is vice-president, director and 25% stockholder. This company provides community based care to approximately 85 adolescents in the State of Virginia.

231. Mr. Nankin has never resided in Nashua and is not a member of any Nashua civic or community organizations. As noted, *supra*, should Community receive the FM grant, he has no commitment to move to Nashua. (TR 1543–1545)

232. According to an amendment to Community's application filed October 6, 1978, Nankin held a 50% interest in Business Publications, Inc., which owned the assets of *New Hampshire Business World*, a monthly newspaper devoted to business news in New Hampshire.[70] (TR 1545–46) Nankin estimated the paper's monthly circulation of 14,000, mostly in New Hampshire, and a Nashua circulation of about 750–1000. (TR 1550) Nankin is a director of Cobblestone Publishing, Inc., which publishes a monthly history magazine for children with about 10,000 subcribers (TR 1550–52).[71]

e. *James T. Walsh*

233. James T. Walsh, a director and 9% stockholder, proposes to devote at least 20 hours a week to local sales and daily stock market reports and commodity news. In doing so, he will emphasize financial matters of local interest. (Community Ex. 5, p. 2; TR 1597)

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[70] By amendment filed January 23, 1979, Community reported that Nankin's interest had decreased to 33⅓%. (TR 154) by amendment filed November 6, 1979, Community reported that Nankin had sold his interest and was no longer either an officer or director. (TR 1548) In its *Petition for Leave to Amend*, Community stated that "The comparative issue is not affected by acceptance of this amendment. . . ."

[71] He does not have a stock interest in this corporation. However, his wife owns 20%. (TR 1551–52).

234. James T. Walsh, a resident of Peterborough, New Hampshire, was born on September 16, 1948 at New York City, New York.[72] As a child, Walsh lived in New York City, New York; Richfield Springs, New York; Madison, Wisconsin; and Pittsburgh, Pennsylvania.[73]

235. Walsh graudated in 1966 from North Catholic High School, Pittsburgh, Pennsylvania. He attended Gannon College, Erie, Pennsylvania, from 1966 to 1970. During 1970 he worked for Asiel & Co. in New York, New York. From 1971 to June, 1972. He attended Franklin Pierce College, Rindge, New Hampshire, and graduated in 1972 with a Bachelor of Arts degree in History. Walsh was a member of Pi Kappa Alpha social fraternity and held the office of Social Chairman at Gannon College.

236. Walsh worked as a stockholder for Tucker, Anthony and R. L. Day, Inc. in Nashua and Peterborough, New Hampshire, for four years, and resigned in 1976. He was then employed as a stockbroker with Burgess & Leith, Inc., in Keene, New Hampshire, and, since June, 1978, in Nashua, New Hampshire, as office manager and vice-president.[74]

237. Walsh was a member of the Milford Rotary Club and has helped in fund raising campaign for the Boy Scouts, United Fund and the Red Cross. He has resided in southern New Hampshire (Rindge, Milford, Peterborough and Hudson), since January, 1971.

238. Walsh had done stock market broadcast reports, without pay, for Station WSMN, Nashua, New Hampshire; Stations WSCV/WSLE, Peterborough, New Hampshire; and Station WKNE, Keene, New Hampshire.

239. Walsh is also treasurer, director and a 14.3% stockholder in Pennico Supply Company, a grain matting and distribution company located in Hillsborough, New Hampshire, 45 to 50 miles northwest of Nashua. (TR 1570)

f. *Question as to When Walsh and Nankin Made 20 hours/week Commitment*

240. In the Community application as originally filed, Walsh was proposed as the fulltime local sales director. However, his commitment was changed in the December, 1978 amendment to a parttime basis. (TR 1571)

241. Walsh maintained that a meeting was called in December, 1978, to discuss specifically the integration proposals of the various stockholders,

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[72] Unless otherwise indicated, the biographical data relative to James T. Walsh is derived from Community Ex. 2, pp. 26–27.

[73] By amendment filed October 1, 1980, Community reported that Walsh had moved to Hudson, New Hampshire, in September 1980. Hudson is part of the Nashua area. However, in its "Petition for Leave to Amend," Community stated that "No comparative benefit will accrue to Community as a result of acceptance of this amendment."

[74] If Community is a successful applicant, Walsh intends no significant changes in his present employment hours of 9:00 a.m.–4:30 p.m., five days a week. (TR 1596) He has advised his immediate supervisor of his commitment to Community. (TR 1599)

that he chaired this meeting in his office, and that Walsh, Ferrand, Lithgow, Bambauer, Bangert and counsel for Community were present. (TR 1581–83, 1600)

242. Walsh also recalled that this December, 1978 meeting was held before December 15, 1978, because if any adjustments were to be made in work commitments they were to have been done then because of the December 15, 1978 "cut-off" amendment date. Walsh recalled that at this meeting they discussed that the Commission should be advised of his change from fulltime status to parttime with a minimum commitment of 20 hours per week and that instructions were given to so inform the Commission. (TR 1584–1601)

243. However, Community's December 13, 1978, "cut-off" amendment reflected only that Walsh would be parttime, without any disclosure that he would devote 20 hours per week to the station. (TR 1589–91)

244. In Community's application as originally filed, Nankin was proposed as the national regional sales director on a partime basis. (TR 1557) Nankin recalled that prior to the filing of the Community application and throughout this entire process, he discussed with Community's counsel and communicated to the other stockholders that he would devote a minimum of 20 hours per week to the proposal. (TR 1559–60)

245. However, Community's application, as originally filed, did not represent that Nankin would devote a minimum of 20 hours per week. As noted, *supra*, it only represented that he would devote parttime. (TR 1518) Nankin was part of the review, discussion and approval of each page of the application. (Community Ex. 7, p. 2) Further, in the amendment relative to the December, 1978 cut-off, it was not set forth that Nankin would devote a minimum of 20 hours per week to the station, but only that he would be parttime. (TR 1397, 1518)

246. Lithgow displayed uncertainty as to when Walsh and Nankin committed themselves to a minimum of 20 hours a week to the proposed station. The December 13, 1978 amendment represented that four shareholders would devote fulltime to station operation and three would devote parttime. Lithgow, who signed the amendment, explained that he, Ferrand, Wallin and Solomon (now Bangert) were to devote fulltime and Hennessy, Nankin and Walsh[75] were to devote parttime. (TR 1511–12) Lithgow initially recalled that both Walsh and Nankin had committed to devote a minimum of 20 hours. (TR 1512) Later, Lithgow acknowledged that he had no recollection of when it was that Nankin made the commitment to work a minimum of 20 hours a week. (TR 1527–28) He went on to relate that at the time the December 13, 1978 amendment was prepared

[75] Walsh's name was incorrectly reported as "Wolfe."

and executed by him Nankin had committed to devote "less than 20" hours and that Walsh had committed to devote "20 or less". (TR 1529–31)[76]

247. Ferrand recalled that, in the December 13, 1978 amendment to the Community application, it was set forth that Walsh would work parttime rather than fulltime, and no commitment was made by Walsh to devote a minimum number of hours to his parttime duties. He recalled that no decision had been made, as of that time, as to the number of hours Walsh would devote to his proposal for parttime participation. (TR 1386–89)

248. Ferrand explained that the decision for a specific number of hours to be devoted by Walsh was made later, during the middle of 1979. (TR 1388) Ferrand received a memorandum from Communtiy's communication counsel, dated February 28, 1979, noting a Commission decision of January 17, 1979, ruling that no integration credit would be accorded a principal who proposes less than 20 hours per week to the operation of a station. Ferrand recalled that this particular matter was discussed within six months thereafter. (TR 1431–33)

249. According to Ferrand, Nankin's commitment of 20 hours per week was not made prior to December 15, 1980. While he could not recall the exact date, he knew it was sometime after February 1979 and believed it was within six months of that date. (TR 1432–34) At one point in his testimony he expressed the view that the decision that Walsh and Nankin would devote a minimum of 20 hours a week to the proposed station was made in preparation of interrogatory responses filed by Community on April 7, 1980. (TR 1395–96)

g. *Other Matters re The Community Proposal*

250. community intends to provide for an auxiliary power supply to be used for its proposed FM station. (Community Ex. 9, p. 4; TR 311)

251. Community's only media interest is its present application for an FM station at Nashua, New Hampshire. None of the applicant's officers, directors and stockholders have or had any other interests in any broadcast station or media of mass communications, except as noted, *infra*. (Community Ex. 6)

252. Martin Nankin is one of five directors of Cobblestone Publishing, Inc., Peterborough, New Hampshire. He does not own any stock in the company, but his wife is a 30% stockholder, stockholder, treasurer, director and the editor.[77] Cobblestone publishes a monthly history magazine for children and has a distribution of approximately 10,000 thoughout the

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[76] No minutes were taken of this December, 1978 meeting. (TR 1601) Community was precise in the delineation of meetings held prior to and subsequent to the filing of its application, detailing discussions of varied application details. However, its preparation and Planning of Application exhibit is devoid of any mention of this December, 1978 meeting. (Community Ex. 7)

[77] Mrs. Nankin's interest decreased from 30% to 20% two months prior to the hearing. (TR 1551–1552)

United States and some foreign countries. Some 15–25 subscribers reside in Nashua. (Community Ex. 6; TR 1550–52, 1564)

253. Nankin became the President, director and 50% stockholder on or about September 5, 1978, of Business Publications, Inc., which acquired the assets of New Hampshire Business World, a monthly newspaper devoted to business news in New Hampshire. (TR 1545) This publication had, at the time, a total circulation of about 14,000, with most in the State of New Hampshire, and 750–1,000 subscribers in Nashua. (TR 1549–50) This media communications interest was reported to the Commission by way of amendment to Community's application on October 6, 1978. (TR 1546)

254. Mr. Nankin's 50% interest in this publication was subsequently reduced to a 33⅓% interest sometime after Christmas in late December, 1978, or early January, 1979. (TR 1547)[78] That portion of his interest between 50% and 33⅓% was sold to counsel for Community, and by amendment of January 23, 1979, the Commission was advised of Nankin's reduced ownership interest. (TR 1547)

255. Subsequently, in September or October, 1979, Nankin divested himself of his remaining 33⅓% interest in Business Publications, Inc. and severed any official relationship with the company. (TR 1548) By Petition for Leave to Amend, and accompanying amendment, tendered on November 6, 1979, the Commission was advised that Nankin had divested himself of his 33⅓% ownership interest and official capacities as President and Director of the publication company. (TR 1548) It was represented in the Petition that the comparative issue in this proceeding is not affected by acceptance of the referenced amendment. (TR 1549)

256. Community proposes a program committee. The function of hte program committee is to insure a continuing dialogue with the communities in the service area by ascertainment of needs and problems in the communities and the proposal of programming to meet the needs and problems ascertained. The Committee will meet twice a month and report to the general manager. As noted, *supra*, its members are Peter Ferrand, Edward Lithgow, and Jane Bangert. (Community Ex. 5, p. 4)

257. In addition, Community proposes a business committee. The function of the business committee is to provide guidance with regard to the business affairs of the corporation. They will review the financial statements of the station, consider methods to increase profits, evaluate financing arrangements, and confer with the General Manager and Treasurer. The Committee will meet once a month and its members are Jane A. Bangert, James T. Walsh, and Martin Nankin. (Communit Ex. 5, p. 4)

258. The stockholders of Community have participated in numerous meetings and activities concerning the preparation and planning of Com-

[78] The Petition for Leave to Amend, which reported this change, was filed January 23, 1979. (TR 1547)

communities and the proposal of programming to meet the needs and problems ascertained. The Committee will meet twice a month and report to the general manager. As noted, *supra*, its members are Peter Ferrand, Edward Lithgow, and Jane Bangert. (Community Ex. 5, p. 4)

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258. The stockholders of Community have participated in numerous meetings and activities concerning the preparation and planning of Community's FM application. Ferrand conducted the general public survey personally. He and Lithgow conducted the majority of the community leader contacts; but all of the other stockholders, except Martin Nankin, also made contacts. The results of the surveys were evaluated by the program committee and the stockholders. The program committee suggested programs to meet the needs ascertained and these were then reviewed and approved by the stockholders. Revisions were made in light of the continuing ascertainment. Ferrand and Bambauer prepared a financial analysis of the corporation's projections and this was evaluated and approved by the stockholders. Ferrand analyzed and visited various alternative antenna sites and he and Wallin visited an alternate site. Ferrand corresponded with Mutual Broadcasting System, Inc. Cree-Radio, UPI, and Fleetweather, Inc., about programming services. He also reviewed correspondence relative to the tower, tape machines, and other equipment suppliers. The stockholders reviewed the application before it was filed. The ownership group evaluated and discussed the competing applicants, as well as the various pleadings and procedural developments throught this proceeding. (Community Ex. 7, pp. 1–6)

C. Comparative Coverage

(a) *Facilities Requested*

259. All four applicants request a permit to construct a Class A FM broadcast station on Channel 292 (106.3 MHz) which would operate with an effective radiated power of 3 kW in the horizontal and vertical planes. Proposed heights above average terrain of the centers of radiation are 250 feet for Merrimack Valley Broadcasting, Inc. (Merrimack) and Community Service Broadcasting of Nashua, Inc. (Community), 255 feet for Sunrise Broadcasting Borp. (Sunrise) and 300 feet for Gateway Broadcasting Associates (Gateway). Merrimack, Sunrise and Community specify the same transmitter site. Gateway proposes a site less than two miles to the southeast. (Joint Ex. 1, pp. 1, 2, 4)

(b) *Comparison of Coverage*

260. Since Merrimack, Sunrise and Community propose essentially the same facilities, their coverage, tabulated as A, *infra*, is considered to be idential. By virtue of its greater antenna height and site separation, Gateway's coverage, tabulated as B, *infra*, differs both in magnitude and location. (Joint Ex. 1, pp. 2, 4)

261. The areas and populations within the 1 mV/m (primary service) contours of the proposed facilities are as follows (Joint Ex. 1, p. 6):

	Primary Service	
Facility	*Area (sq. mi.)*	*Population*
A	534.7	298,072
B	660.7	409,746
A only	12.9	1,201
B only	138.9	112,875
B advantage	126.0	111,674

(c) *Availability of Other Services*

262. No fewer than five other primary aural services are available to the areas of exclusive service of the proposed facilities. (Joint Ex. 2, pp. 2, 4)

D. Whether Sunrise Complied With Section 73.3514 of The Rules

(1) *Preparation of The Permit Applications—Advice Given by Blackburn*

263. The decision to file applications for the Nashua Facilities was made at a meeting held in Boston in December, 1977. Lee White stated that the law firm of White, Fine & Verville would undertake the responsibility of filing the application (TR 1744–45).[79]

264. The firm was not a communications law firm. Prior to the filing of the Sunrise application in January, 1978, the extent of the firm's communications experience was (1) it had represented a broadcast licensee at the appellate level in connection with the appeal of a decision from this Commission; and (2) it had participated in the preparation and filing of an interim application for the facilities of the Nashua stations (TR 17101–11, 1749–50, 1812, 1861). Thomas Blackburn, an associate attorney in the law firm, participated in both of those proceedings (TR 1812, 1861). Lee White, as a senior partner in the law firm, assumed responsibility for the preparation of the application. The responsibility for the preparation of the applications, including Table II, was delegated to Thomas Blackburn, the lawyer most actively involved (TR 1748–52, 1756, 1816–17, 1917–20).[80]

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[79] White and Philip David Fine are Sunrise principals and partners in the firm of White, Fine and Veriville.

[80] In a memorandum dated December 30, 1977, White informed the other Sunrise principals that he would assume the responsibility for completing the legal qualifications section of the applications, which included Table II (Community Ex. 11)

265. Barbara Tamposi explained that the decision to retain White's firm was based on White's statement that Blackburn could assist Sunrise in the preparation of its applications (TR 2654–55). None of the other Sunrise principals asked about or were aware of the extent of Blackburn's communications law experience or whether the White firm was a communications law firm. Barbara and Sam Tamposi, Jr. were generally aware that White had represented the former licensee of Stations WOTW and WOTW–FM in Nashua (TR 2358–60, 2652–55).

266. To prepare himself for the preparation of the application, Blackburn spent four or five days reading the statute, reading the Commission's Rules, reviewing the application form, including the Table II instructions, researching cases having to do with the preparation of applications, and reviewing other applications as examples (TR 1811–16, 1861–62, 1875, 1877–79). Specifically, with respect to the Table II instructions, he researched the term "official relationship" and found cases wherein the term was defined to mean "officers and directors" (TR 1815).

267. During January 1978 Blackburn spent two to five days in Nashua in meetings with the Sunrise principals who lived in the area relative to the preparation of the application. The Sunrise principals in attendance were Barbara Tamposi, Sam Tamposi, Jr., James Tamposi, Peter Nash, Nicholas Tamposi and Marilyn Forest. Barbara and Sam Tamposi were present throughout these meetings. James was present most of the time and the others were present from time to time (TR 1819–1920).

268. Copies of Table II were given to each of the principals. They were instructed to read the instructions and complete Table II. These Table II drafts were then typed and returned to the individuals for their review (TR 1835–1836). Table II information, together with the application, was brought from Nashua to Washington where where it was reviewed prior to filing by both Blackburn and Lee White (TR 1841–1842).

269. The instructions to Table II are as follows:

> The purpose of Table II is to obtain information concerning the occupation, business, and financial interests, at the present time and during the past 5 years of the applicant and of each party to the application named in Table I. In column (a) list the names of all individuals or organizations listed in column (a) of Table I. In column (b) state the principal occupations and businesses in which each party named is engaged at the present time or has been engaged at any time during the past 5 years, and, in addition, state any other business or financial enterprise in which such party has now or within the past 5 years has had either a 25% or greater interest or any official relationship. In each case, state in column (b) the firm name, the principal place of business, and the nature of the business engaged in. In case the party has been associated in business with any other

person or persons, state the name of each such other person. In column (c) state the extent and nature of the interest, official relationship, employment, or association, giving approximate dates.

270. At the January 1978 meetings there were discussions concerning the instructions set forth on Table II. There was a recognition that the involvement in occupations and business was important in determining the amount of time that an individual could devote to the station and that if there was anything that required a significant amount of time, it should be listed in Table II (TR 1821–1822). Blackburn advised that the response to Table II should include the identification of any occupation or business in which the principals were actively engaged or had been during the last five years; financial interests, other than passive or personal investments, in which they had a 25% or more interest; and any official relationship in business or financial interests, which he defined as meaning corporate interests including officer or director (TR 1815). With respect to passive or personal investments of 25% or greater, Blackburn advised that if such investment was in a corporation, it should be reported; that if it was an individual investment held in real estate for speculation or developmental purposes, it would not have to be reported in Table II (TR 1893–94, 1980–81). Blackburn did not remember what advice, if any, he gave as to partnership interests, other than that one's partnership in a law firm, such as Fine's interest as a partner in a law firm, was the type of interest that should be reported (TR 1822–23, 1862–63, 1881, 1894–95). As to trusts, Blackburn did not recall whether there was or was not any discussion (TR 1955–56, 1977).

271. Concerning business and financial interests, other than in a corporation, Blackburn advised that "those things in which they were actively involved, which took up a significant portion of their time," had to be listed in Table II (TR 1880).[81] He advised that passive interests or passive investments, such as one's own home or rental property that would not require any significant expenditure of time would be more appropriately listed on the balance sheet, assuming such interest was the basis for demonstrating financial qualifications[82] (TR 1880–83, 1890–91, 1929, 1933–34, 1967–68). Blackburn recalled a discussion wherein he equated passive type investments with stock market investments and advised that they did not have to be reported unless such investments involved media investments (TR 1892–93).[83]

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[81] Blackburn claimed that he made clear to them that if the interest in a corporation was 25% or greater it had to be reported in Table II regardless of whether they were actively involved (TR 1895–96). However, this testimony contradicts his earlier testimony that stock market investments "didn't have to be reported if the interest was passive" (TR 1891–92).

[82] Blackburn emphasized that his recollection with respect to this particular advice was vague (TR 1881).

[83] There was never any indication by any of the Sunrise principals that any interests should not be disclosed (TR 1963–64).

272. During these meetings Blackburn became concerned with the complexities of the various Tamposi real estate holdings. This concern, however, had more to do with the balance sheet than with Table II. It did not occur to Blackburn that the property listings appearing in the balance sheet should have also been listed in Table II (TR 1956–61, 1963).

273. During the course of the discussions, it became apparent to Blackburn that he would be unable to understand the intricacies of the Tamposi family real estate interests in the few days they had to prepare the applications.[84] Both Blackburn and the Nashua-based principals were aware that the complexity of the Tamposi real estate interests could make it difficult to sort them out in time enough to file an accurate application. This complexity caused Blackburn and the Nashua-based principals concern, especially in the context of Table II and the balance sheets. Blackburn was aware that this could bear on the Commission's reporting requirements, as set forth in Table II (TR 1952–54).[85]

274. At some point prior to the filing of the applications, Blackburn realized that the information regarding the Tamposi real estate interests, as set forth in Table II or the balance sheets or both, was not as complete as he would have liked it. He expressed concern to the Nashua-based principals, directing them to get accurate and complete information, if necessary, from their accountant. The accountant was out of the office during part of this time, possibly on vacation. The principals went to the accountant's office and returned with additional information. According to Blackburn, "whether they did so, they came back to me and represented the information to be correct, and I accepted it as correct at that point." (TR 1956–61, 1974)[86] Blackburn did not conduct an independent investigation into the interests held by the Nashua-based principals, nor did he consider putting a caveat in the applications concerning the completeness of the disclosure of their interests because he believed them to be complete and correct as filed (TR 1961).

275. Phil David Fine had not been present during the meetings in Nashua. Blackburn talked to him over the telephone with regard to preparing Table II. He explained to Fine, essentially, the text of the instructions on the application and specifically, that Fine should list occupations or businesses engaged in during the past five years, financial interests of 25% or greater and any official relationship with organizations such as an officership or directorship of a corporation (TR 1839). He did not recall whether Fine asked any questions about the completion of

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[84] Samuel Tamposi was unable to explain his interests fully without the assistance of his accountant and attorney (TR 1952).

[85] Samuel Tamposi explained Blackburn was "a little bit overwhelmed" by the complexity of their real estate interests. (TR 2360–61)

[86] Blackburn could not recall whether this occurred prior to the filing of the applications or prior to the filing of the first amendment.

Table II. Blackburn telefaxed a blank copy of Table II to Fine. It was completed and returned by Telefax to Blackburn (1839–1841).

276. With respect to Lee White, Blackburn went to his office, explained what was required with regard to Table II, specifically referring to the three criteria set forth in Table II, and left the application with him to be prepared. Blackburn did not remember any particular questions or discussion with White concerning the completion of Table II (1841–42)

(2) *Understanding of the Principals of Sunrise as to Reporting Requirements*

277. As noted, *supra*, there was considerable discussion concerning the completion of Table II. Samuel Tamposi, Jr.[87] and Quentin Peter Nash were the most concerned, because they had more interests than the others (TR 2070–72).

278. The responsibility for completing the Table II forms was left up to the individual principals.

279. It was the understanding of Barbara Tamposi that the information to be listed on Table II should comprise the following: media interests; business interests which involved active participation, irrespective of the amount of ownership, both currently held and for the preceding five-year period; any interest of 25% or greater, both currently held and for the preceding five-year period; business interests in which principals had an official relationship. Barbara Tamposi recalled a discussion concerning the term "official capacity", but could not recall any specific details. Barbara Tamposi construed the term "active involvement" to mean a "9 to 5" job or a substantial or on-going time commitment (TR 2524–25, 2620–27, 2632–34, 2646–48).

280. It was the understanding of Sam Tamposi that the information to be listed on Table II should comprise the following: occupations; interests (real estate, partnership, financial or business) in which the person was actively involved and held a 25% interests; official relationships, which term he understood to mean anything having to do with corporate interests. Sam Tamposi understood that the criterion for listing partnerships in Table II was the same as for listing business and real estate interests, that is, that all such interests must be listed if the person was actively involved at the time or during the preceding five-year period and had a 25% or more interest. It was his understanding that business and financial interests in which one was not actively involved did not have to be reported (TR 2071–74, 2304–09, 2355–56).

281. Sam Tamposi construed the term "active involvement" to include those business and financial interests which he was actively pursuing or

[87] Samuel Tamposi, Jr. is hereinafter referred to as Sam Tamposi.

which he felt would become active in the future in terms of a time commitment. While he did not establish a specific time period, the standard that he applied was an activity requiring two or three hours per week. Active involvement pertained to the commitment of time as distinguished from a financial contribution (TR 2110, 2136–39, 2310–11, 2315–18). Sam Tamposi spends the bulk of his time pursuing new personal investment opportunities. It is this activity, which consists of going out and looking at the properties, which is the most time-consuming. He explained that since most of his current holdings are self-managed or raw land, he devotes minimal time to these interests and investments (TR 2271–73, 2346–49, 2478).

282. Sam and Barbara Tamposi recalled discussions with Blackburn concerning whether trusts had to be listed in Table II. Both Sam Tamposi and Quentin Peter Nash were concerned because of their trust interests. The question was posed to counsel by either Sam Tamposi or Peter Nash as to whether it was necessary to list the trust in Table II if the person had less than a 25% interest and was not actively involved. Barbara and Sam Tamposi's understanding of counsel's response was that if the interest was less than 25% and if the person's role was inactive, it would not have to be listed in Table II. Neither recalled whether or not Blackburn was advised that Sam Tamposi was a trustee (TR 2073, 2246–50, 2349–51, 2523, 2548, 2557–59, 2639–40, 2776–78).[88]

283. In completing Table II in January, 1978, Sam Tamposi applied the active involvement test to his business and financial interests (TR 2312). He experienced some difficulty in trying to determine what was a partnership in view of the fact that he had a number of financial and business interests which were termed "partnerships" for accounting and convenience purposes. However, there were no partnership agreements and they were not registered with the Secretary of State (TR 2073–74). In most cases, the property was held by the individuals as "tenants in common" and the property was held for investment purposes (TR 2110–2113).[89] Sam Tamposi, however, listed those interests in Table II which he was actively pursuing at the time (TR 2073–74).

(3) *Interests Not Reported By Sunrise Principals in Applications As Originally Filed*

284. At the time that the application was filed in January, 1978, Barbara Tamposi held beneficial interests in several trusts which were not listed in Table II. These interests were as follows:

[88] As noted, *supra*, Blackburn did not recall whether trusts were discussed.

[89] These partnerships kept their own books, paid property taxes from funds contributed by the partners and filed information returns with the Internal Revenue Service (TR 2323–26, 2473).

Name[90]	*Interests/Dates*	*Time Commitment*
Tamposi Family Trust	16.66% beneficiary 5/1/66–4/30/79	none
Tamposi Family Trust	16.66 beneficiary 6/1/68–4/30/79	none
Tamposi Family Trust	16.66% beneficiary 12/30/75–3/24/80	none
Tamposi Family Trust	16.66% beneficiary 7/25/77–11/27/79	none
Peter Sam Trust	8.33% beneficiary 3/20/77–12/27/79	none

285. As reflected, *supra,* Barbara Tamposi did not have as much as a 25% interest in any of the trusts, was not a trustee of any of the trusts, and had no active involvement in the trusts (TR 2519–22). Exit 8 Realty was the only interst listed on Table II for Barbara Tamposi. She explained that this interest was disclosed because she owned a 25% interest (TR 2586–89).

286. Sam Tamposi reported the following real estate interests in Table II to the application as originally filed, all of which had their principal place of business at 2 Auburn Street in Nashua (Sunrise Ex. 20, TR 2080):

Name and Nature of Business	*Business Associate*	*Nature of Interests/Dates*
Forest, Tamposi, Nash, Inc.	—	[91]
Buckmeadow Realty	Nicholas E. Tamposi Michael A. Tamposi	25%, 1975
Samuel A. Tamposi, Jr. and Q. Peter Nash	Q. Peter Nash	50%; 1976
Souhegan Woods	Q. Peter Nash James A. Forest	33.3%; 1976

[90] It should be noted, however, that Barbara Tamposi's interests in the Tamposi Family Trust and the Peter-Sam Trust were also listed in Exhibit 5 of the original application and were relied upon to demonstrate her ability to meet her financial commitment.

[91] Table II did not reflect the extent of Sam Tamposi's ownership interest. He was a stockholder in January, 1978, either a 20% or 33⅓% stockholder. Sam Tamposi explained the omission of the stock interest was an oversight (TR 2067–69, 2276–86, 2472–73).

Name and Nature of Business	*Business Associate*	*Nature of Interests/Dates*
Samuel A. Tamposi, Jr. Real Estate		100%; 1977
Brookside Realty	James A. Forest	50%; 1977
Granite State Realty	Q. Peter Nash James A. Forest Mark A. Nash	25%; 1977
Woodside Properties	Q. Peter Nash Nicholas A. Tamposi Mark A. Nash	25%; 1977
Exit 8 Realty	Barbara E. Tamposi James A. Forest Lionel Forest	25%; 1976
Heniker Properties	Thomas Leonard III	50%; 1977

287. There were a number of interests Sam Tamposi held at the time that the application was filed, but which were not reported in his Table II. The reason given by Sam Tamposi for not reporting these interests was that he had no active involvement relative to them.

288. These interests were the following (Sunrise Ex. 22): Northeast Realty Trust, dated April 25, 1977 (TR 2081–82); Tamposi Family Trust, dated May 1, 1966 (TR 2084–85); Tamposi Family Trust, dated June 1, 1968 (TR 2463–64); Tamposi Family Trust, dated December 30, 1976 (TR 2085–86); Tamposi Family Trust, dated June 25, 1977 (TR 2087–88); Peter-Sam Trust, dated March 20, 1977 (TR 2091–93, 2484–88); Celina St. Pierre Trust, William St. Pierre Trust, MacMulkin Trust and Marital Deduction Trust[92] (TR 2093–97); Round Pond[93] (TR 2097–99, 2113); Beautage (TR 2099–2101, 2113); Anders Lane[94] (TR 2113–14); Parish Hill "Partnership"

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[92] The Celina St. Pierre Trust, William St. Pierre Trust and MacMulkin Trust are "Clifford Trusts" which were established by Samuel Tamposi, Sr. for the lifetime of the beneficiary. Under the "Clifford Trust", when the beneficiary dies, the assets of the trust revert back to the donor. These trusts produced rental income and the responsibility of the trustee was to deposit the rental checks into the respective trust fund. The Marital Deduction Trust was established by Samuel Tamposi, Sr. for the benefit of his wife and children. The trust is inactive and its assets consist of an insurance policy (TR 2093–96).

[93] Prior to the filing of the applications, Barbara Tamposi was aware that Sam Tamposi owned an interest in the Round Pond property. She was not aware of Sam's other partnership interests at that time, but she did become aware later in 1978 of Sam's interest in Crestwood at Hollis and, in 1979, of his interests in Parrish Hill and City Realty (TR 2794–2803).

[94] Sam Tamposi's interest in Crestwood and Anders Lane was reported in the balance sheet filed with the application.

(TR 2132–33); Hills Ferry Realty "Partnership" (TR 2134–35); Crestwood at Hollis "Partnership"[95] (TR 2135–38); City Realty "Partnership" (TR 2139–40); Sims Street Realty "Partnership" (TR 2141–42); Sam-Tam, Inc. (TR 2143–44)[96];

289. Additionally, Sam Tamposi did not disclose in Table II that he had been an employee of Sam-Tam, Inc. since January 1976 or that he had served in the United States Army from June 1972 to March 1974 (TR 2143, 2441, 2445).[97]

290. Sam Tamposi explained that these interests which were reported on Table II, set forth, *supra*, reflected active involvement by him or a corporate interest.

291. As noted, *supra*, Sam Tamposi disclosed his connection with Forest, Tamposi, Nash, Inc. in Table II of the original application. However, he did not report the nature of the corporation's business, his ownership interest in or his official relationship to the corporation. (Sunrise Ex. 20) At the time of testifying, Sam Tamposi was uncertain whether he was a 33.3% or 20% stockholder as of January 1978. He believed he was Vice President and Director as of January 1978, although it could have been later. His attorney's records were inconclusive when he checked in November 1980 and, although the Secretary of State's office had this information, he did not obtain it from them. In any event, he was aware at least in 1979 that he was an officer and director of Forest, Tamposi, Nash, Inc. (TR 2467–73, 2496–2503).

292. As also noted, *supra*, Sam Tamposi's interests in Crestwood at Hollis, Northeast Realty Trust, Tamposi Family Trust and Peter-Sam Trust were listed in his financial statement, set forth in Exhibit 5 of the original application, and were relied upon to demonstrate his ability to meet his financial commitment (Sunrise Ex. 18). The financial statement did not, however, disclose when these interests were acquired or that Sam was trustee of the Northeast Realty Trust and of the Tamposi Family Trust (Sunrise Ex. 22, pp. 5–6).

293. At the time that the application was filed in January, 1978, Sam Tamposi was proposed to be integrated on a part-time basis. That pro-

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[95] Sam Tamposi's interest in Crestwood and Anders Lane was reported in the balance sheet filed with the application.

[96] Sam Tamposi's interests in these real estate investments (Round Pond, Beautage, Parish Hill, Hills Ferry, Crestwood, City Realty and Sims Street) was as a tenant in common (TR 2113, 2132–42). The interest held in Anders Lane was 100%.

[97] Sam Tamposi's military service was disclosed in his resume submitted as part of Sunrise's December 15, 1978 amendment (Sunrise Ex. 37, received into evidence by *Memorandum Opinion and Order* (FCC 81M–971), released April 3, 1981.

posal was based upon consideration of all of his activities which required a time commitment (TR 2160–61).

294. Philip David Fine reported the following information on Table II of the original application (Community Ex. 20; TR 2422);

Name and Nature of Business	*Nature of Interests/Dates*
Fine & Ambrogne (Attorneys)	Senior Partner 1962 to present
White, Fine & Verville (Attorneys)	Senior Partner 1973 to present
Commonwealth National Corporation (Bank Holding Company)	Chairman of the Board 16% stockholder 1968 to present
Commonwealth Bank & Trust Co. (Commercial Bank)	Chairman of the Board 1964 to present
Stadium Realty Trust (Real Estate Investment Trust-owner of Shaefer Stadium)	Managing Trustee 1970 to present
Profile Sports Corporation (manufacturer)	Director 1968 to present
Hi-G, Inc. (Electronics Manufacturer)	Director & Asst. Secretary 1962 to present
Flatley Realty Trust (Real Estate Investment Trust)	1973 to 1976
Garden City Realty Co., Inc. (Real Estate Company)	100% stockholder 1973 to present

295. As of January 16, 1978, the date that the Sunrise application was filed, Fine held the following interests which were not reported on Table II (Sunrise Ex. 36):

(a) A 50% interest in a real estate joint venture known as "Phil-Max Associates";
(b) Co-trustee of Allu Realty Trust, a Massachusetts business trust with transferable shares, all of which are owned by Hi-G, Inc., whose relationship with Fine was disclosed in Table II;
(c) A limited partnership interest (15% or less) in St. Germain Associates;

(d) A 10% interest in Whiteacre Orange, a real estate venture in Mariford;
(e) Joint owner with Norma Fine of a house in West Hartford, Vermont, which generates rental income;
(f) Trustee under various testamentary and intervivos trusts for clients;
(g) Trustee of civic and charitable entities.

296. The failure to include these matters was as a result of inadvertence and not as a result of any intent to withhold information from the FCC (Sunrise Ex. 36).[98]

297. The only item listed by James Tamposi in Table II was his employment as a salesman since 1977 with Stoudt Realty in Nashua (Sunrise Ex. 21, TR 1986). He did not list his previous part time employment at a gas station because Blackburn advised him only full time employment had to be disclosed (TR 2042). James Tamposi did not recall the instructions given by Blackburn to the Nashua-based principals because he had no business investments at that time and Blackburn, accordingly, did not spend much time with him (TR 1984–5).

298. The only interests reported by Lee White in Table II of the application as originally filed were his partnership in the firm of White, Fine and Verville (April 1973 to present) and his previous status as a self-employed attorney (September 1972–April 1973) (Sunrise Ex. 17, TR 1810). He held no other business or financial interests, as defined in Table II, during the period January 16, 1973 through January 16, 1978 (TR 1786–87)

299. Based on Blackburn's advice and his reading of the instructions to Table II prior to the filing of the application, White understood "principal occupation" to be the activity to which an individual devoted most of his time and from which he derived the bulk of his income. He understood the term "official relationship" to encompass the positions of officer, director and partner. Although he felt the terms "trustee" and "director" are frequently interchangeable, he didn't remember whether official relationship also encompassed the position of trustee (TR 1751–56).

(4) *Disclosure Of Robert Saner's Interests in Table II When He Became A Sunrise Principal*

300. Robert Saner became an 8% Sunrise stockholder in the fall of 1978. His Table II information, which was first submitted to the Commission in

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[98] A biographical statement of Phil David Fine, which was submitted as part of an amendment filed in December 1978, reflects, among other things, that he was a director and trustee of numerous civic and charitable entities (Sunrise Ex. 37).

Sunrise's December 15, 1978 amendment, reported the following interests (Sunrise Ex. 34; TR 2842–44, 2847–48).

Name and Nature of Business	*Nature of Interests/Dates*
White, Fine & Verville (Law Firm)	Partner 1976 to present
Flagstaff Lodge Co., Inc. (Real Estate Development—in process of dissolution)	Director 1972 to present
Mott-McDonald Associates, Inc. (Consulting Firm)	Director—1975 to present Secretary—1976 to present Treasurer—1977 to present

301. Saner acknowledged that he had also been employed as an associate in the firm of White, Fine & Verville from July 1974 until 1976 and that he had been a special assistant to the administrator of the Office of Health of the President's Cost of Living Council from March 1973 until July 1974 (TR 2876–77, 2890–91). He did not list these positions on Table II because, in his opinion, the instructions ask for occupations, not positions or titles, and his occupation had been a lawyer since he graduated from law school. He acknowledged that these positions were the source of his livelihood (TR 2843–44, 2877–78).

302. Saner was given a copy of Table II by Blackburn. They did not have a detailed discussion about it although Blackburn may have shown him copies of similar tables filled out by other stockholders (TR 2878). Saner did not discuss the instructions to Table II with any of the Sunrise principals. He simply filled it out, returned it to Blackburn and reviewed it prior to its submission to the Commission (TR 2882).

E. Whether Sunrise Complied With Section 1.65 of the Rules

(1) *Advice Given By Blackburn*

303. In the course of preparing Sunrise's applications in January, 1978, in Nashua, Blackburn advised Barbara, Sam and James Tamposi, and Q. Peter Nash, of the requirements of Section 1.65 of the Commission's Rules (TR 1843–44, 1868–9). Specifically, he informed them of their responsibility for maintaining the continuing accuracy and completeness of the information set forth in the applications. He advised that whenever such information was no longer substantially accurate and complete in all significant respects, the application should be amended within 30 days

unless due cause is shown (TR 1863–4, 1876). Blackburn also advised them that if any change occurred, in Table II or financial information or otherwise, which adversely affected their application (e.g., integration proposal, engineering or financial commitment), the change must be reported to the Commission within 30 days (TR 1845, 1858–9).[99] Although he had copies of Section 1.65 with him, Blackburn did not recall whether he showed it to them at that time. (TR 1845, 1865–6). Blackburn believed the Nashua-based Sunrise principals fully understood the provision of Section 1.65 as of January 16, 1978 (TR 1872).

304. Blackburn had numerous discussions over the course of the year following the filing of the applications with the principals concerning Section 1.65 (TR 1850, 1857–58, 1860, 1870). He advised that if a significant change occurred with respect to Table II information or if their positions were adversely affected or the application was adversely affected, such information must be disclosed (TR 1858–59).

305. He also discussed Section 1.65 with Lee White and Phil David Fine. The discussion with White was in general terms, that is, the import of Section 1.65. They discussed the obligation to file amendments with the Commission. The discussion with Fine was of a more summary nature, but Blackburn believes that Fine was aware of the obligation to file amendments to report matters regarding either improvement or adverse changes (TR 1846–1850).

306. Blackburn relied on each of the principals and on Barbara Tamposi to report changes. Barbara Tamposi was the most active principal and she was his contact point. The principals had the obligation to report changes either to Blackburn or to Barbara Tamposi (TR 1885–86).

307. Prior to filing amendments in February, November and December 1978, Blackburn again discussed with the Nashua-based Sunrise principals the necessity of maintaining the currency of the information in Table II (TR 1870–2). He had numerous discussions as to the requirements of Section 1.65 with Barbara Tamposi while she was in Washington, D.C. during the period January and May 1978 (TR 2525–35). During 1978, Blackburn received no communications apprising him of changes in Table II information (TR 1870–71).

308. There were frequent and on-going discussions concerning the substance of Section 1.65 between Barbara, Sam and James Tamposi and

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[99] Blackburn provided advice as to the words "substantially accurate and complete in all significant respects". He recalled a question concerning mortgages. He advised that if the balance sheets reflected a mortgage and the mortgage was paid off, that was not the type of thing that had to be reported. He advised if a note was paid off early or in its entirety it should be reported. (TR 1845–1846, 1876–1877)

there were numerous telephone calls concerning the substance of Section 1.65 between Barbara and Washington counsel and between Barbara and the other non-Nashua principals (TR 1994, 2154–56, 2051, 2532, 2534–35, 2537, 2540–41).

2. *Understanding Of The Principals As To The Reporting Requirements of Section 1.65*

309. Based on Blackburn's advice in January 1978, Barbara Tamposi understood that any changes which were substantial and significant and which would adversely affect Sunrise's financial, legal or engineering qualifications, or the diversification or integration criteria, were required to be reported by amendment to the Commission (TR 2526–33, 2594–6, 2674–77, 2682). Changes impacting on integration included any endeavor in which a principal became engaged on an active and ongoing basis and which "might have some bearing" on the integration proposal (TR 2529). Ms. Tamposi understood that real estate acquisitions did not have to be reported unless they would require her active involvement on an ongoing basis (TR 2677, 2683–4). She also understood that a principal business or occupation need be reported only if it involved an obligation to devote most of her time on an ongoing basis. She explained that she did not disclose her real estate acquisitions or other real estate related activities because she was not obliged to devote any time to them (TR 2630–2, 2646–8).

310. In conversations with Blackburn, Barbara inquired concerning the necessity of reporting various business ventures in which she might become involved. She inquired concerning the flower export business which would entail her moving to South America and was advised that this type of activity should be reported because it would bear upon the integration proposal and affect the comparative factors (TR 2528–30). She inquired about real estate investments, since she knew that she would have the opportunity to make such investments because of her family business. She was advised by Blackburn that there would be no need to report these investments because these matters would not have any effect on integration and would be strictly investments. She also inquired about a foam product business where she would become involved in the manufacture and distribution of foam products and was advised by Blackburn that since this would require day to day activity, it would affect integration and must be reported (TR 2531, 2683).

311. Sam Tamposi understood, based on Blackburn's advice, that he had a continuing obligation to update Sunrise's applications concerning substantial and significant changes which would adversely affect his financial

or integration commitments or the diversification criterion (TR 2181–82, 2302–3, 2356–7). He was not aware of the term "substantial and significant" in this context until he read Section 1.65, which may have been in January 1978 or August 1979 (TR 2052, 2063–4, 2081–2). Although some of his passive interests became active and he became involved in existing or newly acquired real estate interests, they did not have to be reported, as he understood it, unless they required a substantial time commitment and could seriously infringe on his integration commitment. For this reason, he did not disclose the business and financial interests set forth, *infra* (TR 2157–63, 2318–22).

312. Based on Blackburn's advice in January 1978, it was and still is James Tamposi's understanding that Sunrise and its principals had a continuing obligation to maintain the completeness and correctness of the applications and that if there were significant and substantial changes in the information in the applications, they had to be reported to the Commission within thirty days (TR 1993–94, 2012–14). He understood that these reporting requirements applied to changes which adversely affected Sunrise's integration or financial commitments; for example, if he were arrested, no longer able to work at the station or went into bankruptcy (TR 2133–35). James Tamposi was also advised that new business or financial interests should be disclosed if they would have a detrimental affect on the applications, but he doesn't remember asking whether they had to be reported otherwise (TR 2025–26, 2047–51).

313. Both Barbara and Sam Tamposi understood that the requirements of Table II and Section 1.65 were two separate matters. Barbara Tamposi explained that while she understood that a 25% or more interest without active participation had to be reported in Table II, she had no understanding that a subsequently acquired 25% interest had to be reported under Section 1.65 (TR 2666–67); Sam Tamposi explained that he understood the requirements of Section 1.65 and Table II were two separate matters. He had no understanding of the need to report a later acquired corporate interest unless it impacted upon his ability to carry out his integration proposal (TR 2158–59, 2241–42).

314. Sometime in 1979, Sunrise retained the law firm of Cohn and Marks as communications counsel (TR 1766–68). On March 15, 1979, Sunrise's new counsel sent a letter to Robert Saner, stating in pertinent part (Sunrise Ex. 16; TR 1722):

> . . . you should be made aware of Section 1.65 of the Commission's rules, which require that applications be kept current. In this respect and since a number of Sunrise principals are relying upon real estate holdings to meet their respective financial commitments, any changes related to property which forms a basis of their commitment must be reported to the Commission.

Saner and White acknowledge receiving and reviewing this letter in the ordinary course of business (TR 1717–18, 1792, 2845–6). Barbara Tamposi did not recall whether she received the letter (TR 2543, 2699). Sam Tamposi received the letter but did not recall when he read it (TR 2383–5).

315. On August 14, 1979, counsel also sent a letter, which included a copy of Section 1.65, to White with copies plus enclosures to Saner and Barbara Tamposi. The letter stated in pertinent part (Sunrise Ex. 15; TR 1722):

> I also want to remind you and the other principals of Sunrise of Section 1.65 of the Commission's Rules which requires that pertinent and significant information as to the applications be kept current. For example, to the extent that a principal is relying upon a balance sheet which has been previously submitted to the Commission, and which supports the basis for finding that individual (or the applicant) financially qualified, updated financial information should be submitted in the event of any substantial change. Further, the acquisition of any media interest or the assumption of a new position which might interfere with an individual's proposed integration representation must be reported. In this respect, Community Service recently filed an amendment to reflect that Martin Nankin had been elected as a Director of Cobblestone Publishing, Inc., and Gateway Communications recently filed an amendment to report that the Zoning Board has denied rezoning for its proposed transmitter site and that negotiations for a new site were in progress. I am also enclosing a copy of Section 1.65 for your convenience.

Saner, White and Barbara Tamposi acknowledged receiving and reviewing this letter in the ordinary course of business (TR 1714–15, 1792, 2541–2, 2846). It is likely that both Sam and James Tamposi saw this letter (TR 2541–43).

316. It was understood by the Sunrise principals that any changes in the information set forth in the applications which was required to be disclosed to the Commission by amendment would be reported to Barbara Tamposi or to counsel who would make the final decision as to whether disclosure was required. Each principal was responsible for bringing their own changes to the attention of the applicant (TR 1885–87, 2303–4, 2679–80).

3. *Sunrise Answer To Interrogatory*

317. In March 1980, Community propounded interrogatories to Sunrise. Interrogatory 20 read as follows (TR 2399–2400):

> State whether or not the information supplied by Sunrise in its applications is true, complete, and correct as of the date of these answers. If not, state what information is not true, complete and correct, and provide the current information relative thereto.

Sunrise's answer to interrogatory 20, executed in affidavit form by Barbara Tamposi on April 4, 1980, read as follows (TR 2146–47):

Sunrise has no basis for belief that its applications, as amended, and set forth in petitions for leave to amend, contain any untrue information.

Barbara Tamposi reviewed the applications, as amended, prior to executing the affidavit. She was aware at that time that she and Sam had acquired business interests since the filing of the applications that had not been reported in Table II. She did not believe the applications, as amended, contained any untrue information and she never intended to withhold information which the Commission required to be reported (TR 2582–85). Sam Tamposi also acknowledged that he had acquired business interests since the filing of the applications which had not been reported. He explained that he read the interrogatory in terms of the requirements of Section 1.65 (TR 2147–49).

4. *Business and Financial Interests Acquired by Sunrise Principals Subsequent To The Filing Of The Application And Not Reported By Amendment*

318. Between January 16, 1978 and January 7, 1981, Sunrise reported no changes in the business and financial interests of its principals (TR 2011–12).[100]

319. By amendment filed January 7, 1981, Sunrise officially reported the business and financial interests of its principals acquired subsequent to January 16, 1978. These interests, and the reasons given for non-disclosure, are set forth, *infra*.

320. The business and financial interests acquired by Barbara Tamposi subsequent to the filing of the application and first reported by amendment to Table II filed January 7, 1981, are detailed, *infra*. All of the interests involved are real estate interests. These interests are as follows (Sunrise Ex. 32):

(a) Miss Tamposi had a 50% interest in Two Sisters Realty. This was not a formal partnership. Its assets consisted of 2.6 acres of land n Nashua. The acquisition of the property constituted a financial investment. The property was acquired in November 1978 and sold in April 1979. The property involved no on-going time commitment. The acquisition of the property had no adverse effect on any of the five criteria. She devoted a total of 2 hours and 20 minutes to this interest (TR 2560–62, 2811–12).

(b) Paxton Terrace Associates was a joint venture in which Barbara Tamposi held a ⅙ interest. This interest, bought September 1979

[100] Sunrise did file other amendments during this time period, reporting *inter alia* that (1) Barbara Tamposi was sworn in as representative to the New Hampshire State legislature (Sunrise Ex. 29, TR 2549); (2) James Tamposi was accepted at law school, was considering enrolling, and, in fact, decided to enroll (Surnrise Exs. 28, 31; TR 2547–9); (3) Samuel Tamposi changed his residence from Nashua to nearby Hollis (Sunrise Ex. 30; TR 2549); and (4) Lee White changed his residence from one location to another in Washington, D.C. (TR 2707–8).

and sold April 1980, was a financial investment and involved no time commitment. She spent 1 hour relative to the closing on the property (TR 2562, 2808–10).

(c) Miss Tamposi acquired a 25% interest in Highwood Associates, a legal partnership, involved in the acquisition of 14 acres of raw land, which was placed in a "land bank", that is, an account similar to accounts which hold stocks and bonds. This acquisition was a financial investment and involved no time commitment (TR 2563–65).

(d) Back River Road consists of 3.04 acres of raw land puchased for financial investment in October 1980 by Miss Tamposi. It does not require any time commitment (TR 2564–66).

(e) Bly Farm Associates, a financial investment in which Miss Tamposi owns a ⅙ interest, was acquired July 31, 1980. Its asset is a piece of land in Concord, New Hampshire. It does not require any time commitment (TR 2566).

(f) Pine Hall Gardens Associates is an entity, not a legal partnership, in which the asset consists of an apartment complex in Nashua. The unit is managed by a management company which takes care of the day-to-day operation. Miss Tamposi, who acquired a 50% interest in June 1980, has a time commitment of about three minutes a month for review of the monthly financial statements (TR 2566–69).

(g) Sunrise Terrace of Lantana Associates is an entity in which Barbara Tamposi owns a ⅙ interest. The asset consists of condominium units. Miss Tamposi has no on-going time commitment to this interest which was acquired in February 1979 (TR 2568, 2804–05, 2830–310).

(h) Peter-Sam Investment Properties is a family partnership in which Barbara Tamposi owns an 8.33% interest, acquired December 7, 1979. One of the assets of this partnership is a corporation (Topspin Tennis Club), of which she is an officer. Barbara Tamposi performed no duties as an officer, and the property was operated under the auspices of the Peter-Sam Investment Properties. She had no on-going time commitment to the Peter-Sam Investment Properties.[101] (TR 2569–70, 2750–51, 2813–14)

(i) Maine Properties is a legal partnership which owns land for the purpose of constructing a family summer home. Miss Tamposi acquired her ⅓ interest in September 1980 and devotes little or no time to this enterprise (TR 2569–70, 2813–14).

(j) The Tamposi Family Investment Properties is a partnership in which Barbara Tamposi owns a ⅙ interest, acquired September 1,

[101] The Topspin Tennis Club was a corporation acquired in December 1979 by the Peter-Sam Investment Properties at a foreclosure sale. When this corporate property was acquired, it was necessary to appoint officers and Barbara Tamposi was selected to be the treasurer. The property was acquired for the purpose of utilizing the land for industrial building purposes (TR 2749–52).

1979. She has no on-going time commitment to this interest (TR 2570).

(k) CNT Investment Properties is a general partnership in which Barbara Tamposi acquired a 5.5% interest in January 1980. Barbara Tamposi has no on-going time commiment to this interest (TR 2571–72).

(l) Betty Tamposi Real Estate is a holding company and is the mechanism through which all financial transactions of Barbara Tamposi are channelled; occasionally, it also operates as a brokerage firm. Miss Tamposi is the sole proprietor of this entity which was former in October 1978 (TR 2572–73).

(m) Sam-Tam, Inc., is a company owned by Samuel Tamposi, Sr. Barbara Tamposi functions as a consultant; her responsibilities and time commitment varies from 5 to 6 hours one day to nothing for 6 months. There is no on-going time commitment (TR 2573).

321. Barbara Tamposi expressed the view that she did not have a principal occupation between January 16, 1978 and the date of her supplemental testimony at hearing. She acknowledged she has been actively involved as a real estate consultant since October 1978, receiving a regular weekly salary of $119.50, but could not say whether she considered herself principally occupied in the real estate business in October 1978 (TR 2644–5).[102] Since graduating from college in May 1978, she has divided her time among real estate-related activities, including real estate brokerage, development, appraisal and speculation, with the largest portion of her time devoted to acquiring new real estate interests (TR 2600–03, 2781–82).[103] She does not consider being a real estate investor a "job" but, rather, an activity that she engages in for her livelihood. Although she has held a broker's license since 1979, she has done very little brokerage and does not consider herself a broker (TR 2605–22, 2642–50).

322. As noted, *supra*, Sunrise amended its application on several occasions. It reported that Barbara Tamposi had been sworn in as a representative to the New Hampshire General Court. This was reported because Miss Tamposi felt this was a substantial or significant change that "might conceivably adversely affect" her integration proposal and that it was up to the Commission, not Sunrise, to decide whether this was the case (TR 2709–10). Similarly, Sunrise reported James Tamposi's accep-

[102] As noted earlier in the findings, Ms. Tamposi was elected to the New Hampshire state legislature, which holds sessions bi-annually, in February, 1980. When in session, she devotes about 3 or 4 days per week to this pursuit; otherwise, she devotes about 95% of her time to acquiring new real estate investments. (TR 2649–50)

[103] Sunrise included as part of its December 15, 1978 Amendment Barbara Tamposi's resume which reported, *inter alia*, that she was employed in "Real Estate Sales and Development" in September 1978 (Sunrise Ex. 37).

tance to law school, and, later, his decision to attend, because it might have been considered to bear on his integration commitment. Sunrise also reported Samuel Tamposi's change in residence from Nashua to nearby Hollis because it would bear on his integration proposal (TR 2707–09).[104]

323. Ms. Tamposi's understanding of the requirements of Section 1.65 has not varied from her original understanding based on Blackburn's advice in January 1978 (TR 2677). She first saw a copy of Section 1.65 when she received a copy of the Cohn and Marks letter dated August 14, 1979 to White (Sunrise Ex. 15).[105] Also affecting her understanding of Section 1.65 was a letter dated September 25, 1979 from counsel to her, which read in pertinent part (Sunrise Ex. 19, p. 18):

> We received today a copy of a Petition for Leave to Amend filed by Community Service, the purpose of which was to report a new business interest of one of its principals, James T. Walsh. The new interest was that Mr. Walsh had become an officer, director and minor stockholder of Pennacook Supply Company, Inc., a company engaged in grain milling and distribution. I bring this to your attention, not for the substance of the amendment, but as a reminder of the necessity to keep the Sunrise application current as to pertinent matters.

324. This amendment and advice of counsel did not affect her understanding of Section 1.65 because, based on conversations with her friends who were principals with Walsh in this enterprise, she understood Walsh was taking an active role in the formation of the company and an attempted acquisition of another company. She did not ask Walsh whether or not he was taking such an active interest or whether his integration proposal was affected thereby (TR 2775–6).

325. Barbara Tamposi never drew a parallel or understood that there was a connection between Table II and the requirement to keep applications current. She understood the necessity of reporting an on-going activity, i.e., running a store, because of the possible bearing upon the integration criterion. However, she believed that since financial investments required no on-going time commitment, could be disposed of or disregarded, such investments had no bearing on integration and, therefore, did not constitute the type of activity that had to be reported (TR 2646–48).

326. According to Barbara Tamposi's understanding, the acquisitions listed (a)—(m), *supra*, were not the kind of information that had to be reported after the application was filed, since these investments in no way

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[104] Sunrise later reported White's change in residence to another location in Washington, D.C., even though it would admittedly not affect Sunrise's integration proposal, because Barbara believed the Commission wanted to be kept apprised of the current residence of all principals (TR 2707–8).

[105] Ms. Tamposi did not recall whether she had seen a copy of the March 15, 1979 Cohn and Marks letter to Saner (Sunrise Ex. 16). However, at deposition, she acknowledged that she read the letter and that it affected her understanding of Section 1.65 (TR 2766–70).

adversely affected the five comparative criteria (integration, financial, engineering, diversification, or legal). It never occurred to her that these types of investments should be reported to the Commission. Miss Tamposi explained that had she acquired the Exit 8 property, in which she had a 25% interest, subsequent to the filing of the application, she would not have reported it to the Commission, since she was not actively involved (TR 2574, 2589–92).

Samuel A. Tamposi, Jr.

327. Business and financial interests acquired by Sam Tamposi subsequent to the filing of the application and first reported by an amendment to Table II filed January 7, 1981 are set forth, *infra*. All of the interests involved are real estate interests, consisting primarily of non-active investments. Sam Tamposi explained that none of the interests were reported since, in his opinion, they had no adverse effect on his financial qualifications or his integration proposal. The time commitments to the various interests vary. For example, with respect to his time commitment to the Northeast Industrial Properties, there were times when he would spend a half a day or more on this activity and there would also be periods of one or two months were he did nothing but write a check or make a deposit (TR 2339–2341). Most of the time involved in terms of a time commitment to these real estate interests occurs at the time the property is acquired (TR 2331–2333).[106] In addition, the real estate interests are constantly changing in that property is exchanged, interests are liquidated and replaced by new interests so that the total time commitment to his real estate interests would not vary (TR 2100–2101, 2061–62, 2321–22).

328. The interests involved are the following (Sunrise Ex. 19):

329. (a) The Northeast Realty Trust, dated June 1, 1978, was a successor to the Trust of April 25, 1977. The time commitment varied from months where there was no time commitment to periods of time when he devoted several hours a day. The assets of this trust were raw acreage.[107] (TR 2166–70, 2176–77, 2180–81, 2321–22)

330. (b) Northeast SMNS Industrial Properties, a partnership, dated November 1, 1979, was a successor to the Northeast Realty Trust. Sam Tamposi had a 40% interest and was the managing partner. As in the case of the Realty Trust, Sam Tamposi's time commitment varied from months with no time commitment to periods when he spent several hours a day. The interests of this partnership were real estate, were of a temporary

[106] Raw land is purchased and is surveyed and plotted and sold for development (TR 2333).

[107] Sam Tamposi's interest in Northeast Realty Trust was reflected in his partial balance sheets dated November 22, 1978 and April 12, 1979 (Sunrise Exs. 24 and 25). However, his role as trustee was first reported in the January 7, 1981 amendment (Sunrise Ex. 19).

nature, and could be sold at any time. (TR 2182–88, 2197–98, 2437–41, 2474)

331. (c) The Tamposi Family Investment Properties is a partnership dated September 1, 1979. It constitutes a consolidation of several earlier family trusts. Sam Tamposi, the managing partner with a ⅙ interest, spends one to two hours monthly on the activities of this interest (TR 2203–09, 2339–40, 2396–98).

332. (d) Peter-Sam Investment Properties, a partnership dated December 15, 1979, is a successor to the Peter-Sam Trust. The assets of this partnership are industrial properties which are self-managed. Sam Tamposi, the managing partner with an 8.55% interest, spends 5 to 15 minutes a month attending to the partnership interests (TR 2207–09).

333. (e) CNT Investment Properties is a partnership dated January 1, 1980 and is a successor to the CNT Realty Trust, which was established May 10, 1978. Sam Tamposi, the managing partner with a 5.5% interest, had no time commitment to the realty trust and spends less than 5 minutes a month attending to the business of the partnership (TR 2224–29).

334. (f) Sam-Nick Realty "Partnership" was not a formal partnership. Its asset consisted of raw land held for investment purposes. Sam Tamposi had a 50% interest from May 12, 1978 to September 16, 1980, at which time his interest increased to 100%. Sam spends less than two minutes amonth on this activity (TR 2230–31).

335. (g) Walt-Sam Realty "Partnership" is not a formal partnership. Its asset consists of 1½ acres of raw land. Sam's 50% interest was acquired June 19, 1978. He has no time commitment (TR 2231–32).

336. (h) Laconia Properties "Partnership" is not a formal partnership. Its asset consists of raw land. Sam Tamposi, who obtained his 50% interest in September 1979, devotes approximately a minute a month to its activities (TR 2234–35).

337. (i) Auburn Realty "Partnership" is not a formal partnership. Its asset consists of an undeveloped two-acre parcel of land. Sam Tamposi acquired a 25% interest in April 1979. He has no time commitment to this interest (TR 2235).

338. (j) Hillside Realty "Partnership" is not a formal partnership.[108] Its asset is raw land subdivided into 13 lots.[109] Sam Tamposi spends less than one minute a month on this interest, which was acquired in 1979 (TR 2236).

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[108] Sam Tamposi's interest in the real estate investments Sam-Nick Realty, Walt-Sam Realty, Laconia Properties, Auburn Realty, and Hillside Realty was as a tenant in common (TR 2230–36).

[109] Sam's interest in and involvement with Hillside Realty is as managing partner of Tamposi Investment Properties which owns a 50% interest (TR 2236).

339. (k) Maine Properties consists of a three-acre parcel of land acquired in July 1979 held for the purpose of building a summer home (TR 2237–38).[110]

341. (m) Tam-Char, Inc. is a corporation with one asset, a bulldozer. The bulldozer is utilized primarily on behalf of Northeast SMNS Industrial Properties. The corporate entity form was utilized in order to limit liability in case of injury to property or a third party. Sam acquired a 26.66% interest in March 1980 and is President, Treasurer and director (TR 2239–40, 2287–89).

342. (n) Durham Shopping Center. Sam is the managing partner of this property which is held by the Tamposi Family Investment Properties (TR 2396–98).

343. (o) Millford Shopping Center. Sam acquired a 33% interest in December 1980 in this real estate investment (TR 2254). At the time of hearing he and the partners were actively pursuing development of the property (TR 2378)

344. (p) Brookside Realty. Sam Tamposi acquired a 37.5% interest in December 1980.

345. (q) Rolling Acres was not a formal partnership. Sam Tamposi acquired a 50% interest in this real estate investment in February 1978. It owned raw land, which was disposed of in December 1978. It involved no commitment of Sam Tamposi's time (TR 2231–33).

346. (r) CNT Realty was a trust of which Sam Tamposi was a trustee from May 10, 1978 to January 2, 1980. The Tamposi Family Trust had a 1/3 beneficial interest in this trust. Sam Tamposi's time commitment represented less than 5 minutes a month (TR 2225–26, 2341–42).

347. (s) A–Z Day Center, Inc. Sam Tamposi became the President, Clerk and director in July 1980. He initially devoted 2 days to this enterprise and none thereafter (TR 2339–40).

348. Sam Tamposi explained that the time commitments he had furnished are his estimates of the average time devoted to each endeavor. The time commitments fluctuate, sometimes requiring blocks of time as much as a day or two and sometimes requiring no time (TR 2334–5). Generally, prior to the purchase of a piece of property, he inspects it, talks to engineers, reviews agreements drafted by his attorneys and visits the Zoning Board (TR 2342–). After the purchase, he often attends planning board meetings, hires engineers or surveyors to subdivide the land, or negotiates leases (TR 2329–5).

349. It was Sam Tamposi's understanding of Section 1.65 that if an activity would seriously impinge on his time commitment it would have to be reported. For example, if Tam-Char, Inc. acquired more bulldozers

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[110] Title to this property is actually in the name of a third person who holds the land in trust for the benefit of Sam and two others (TR 2137).

and more employees and, as a result of this increased activity, involved Sam Tamposi on a full-time basis, that is the type of change that he understood would have to be reported under Section 1.65 (TR 2319–20).

James Tamposi

350. The business and financial interests acquired by James Tamposi subsequent to the filing of the application and first reported by the amendment to Table II filed January 7, 1981 are set forth below. All of the interests involved are real estate investments. None of the interests were reported since, in the view of James Tamposi, they had no adverse effect on his financial qualifications or his integration proposal.

351. These real estate interests are as follows (Sunrise Ex. 22):

(a) Partridge Berry Hill, consists of rental units acquired June 12, 1978 and sold August 5, 1979 (TR 1957).

(b) 90 Cannongate III, also rental units acquired July 1979 (TR 1997).

(c) Partridge Berry Hills, rental units acquired May or June 1980 (TR 1997).

(d) Sugar Mill Woods; 11 condominium rental units were acquired August 1980 and 4 October 1980 (TR 1997, 2007–08).

(e) Laconia Properties are rental units acquired September 1979 (TR 1997).

(f) Partridge Berry Hills are additional rental units acquired June 1979 (TR 1997).[111]

352. All of these interests are real estate investments. They consist of condominium units purchased for resale and rented in the interim (TR 1990–92). Jim Tamposi had to take back a mortgage for each of these properties and were he unable to sell or rent a piece of property, would still have to make the mortgage payments (TR 1997–98). He personally handled the rental for Items (a), (b), (c) and (f). This required "very little time," (TR 1996, 2007). He has paid or will pay taxes on the rental income which he received from these units and from the profits realized from their resale (TR 2040–42).

353. James Tamposi has no on-going time commitment to any of the properties and does nothing with respect to these interests other than collect rent (TR 1987–92, 1997–98, 1999–2000, 2007–2009). These interests were not reported to the Commission because James Tamposi understood that only changes which adversely affected the application had to be reported (TR 1994–97, 2001–02, 2013, 2025–26, 2047–48, 2051).

354. On April 4, 1980, when Sunrise responded to Community's Interrogatory 20, James Tamposi owned some of these units and Barbara was

[111] James Tamposi had a 100% interest in (a), (b) and (c), *supra*, and a 50% interest in (d), (e) and (f), which are not formal partnerships (TR 1997, 2000, 2007–09, 2061–63).

aware of this. James assisted Barbara and Sam Tamposi in preparing the answers to Community's interrogatories, reviewed interrogatory 20, and approved the answer. He believes his response was complete and correct as of that date because his interests had no bearing on his integration or financial commitments (TR 2001–2, 2030–33).

355. In August 1980, James Tamposi terminated his employment with Stoudt Realty and in September 1980 began attending law school in Boston, Massachusetts. Sunrise notified the Commission of this latter fact by amendment dated August 11, 1980. While Sunrise represented in the amendment that James would quit law school if Sunrise were successful, it nonetheless reported this fact because James felt the Commission might perceive it as adversely affecting his full time integration commitment (TR 2003, 2010–11, 2048).

Lee White

356. As noted, *supra*, Lee White is a partner in the law firm of White, Fine & Verville (TR 1710). At the time that the Sunrise application was prepared in January, 1978, White was aware of the substance of Section 1.65 through discussions with Thomas Blackburn (TR 1720, 1745, 1761). He was further apprised of the substance of the rule through correspondence received from communications counsel in March, 1979 and in August, 1979 (Sunrise Exs. 15 and 16; TR 1717–18, 1793–94). White recalled reading a copy of the rule which was included as an attachment to the August 1979 letter at or about the date of the letter. He may have read the rule at an earlier date (TR 1712–14, 1717, 1761).

357. White had been advised by Blackburn of the obligation to keep the application current with respect to any significant changes or circumstances of major consequence. Based upon his discussion with Blackburn and the correspondence received from communications counsel, he understood the term "signficant change" to include such things as violations, acquisition of a communications interest or change in employment (TR 1720–21, 1761–62, 1793,–94).

358. In June, 1980, White was elected to the Board of Governors of the New York Mercantile Exchange (TR 1734, 1791–92).[112] The New York Mercantile Exchange is a commodities futures market where commodities are traded in an "open pit". The exchange is either an association with memberships or a partnership with partners. The most common and active commodities traded on the exchange are potatoes and heating oil. The exchange is basically self-regulated, governed by a Board of Governors which consists of members elected by the Exchange and three outside public members, who are not members elected by the Exchange

[112] This fact was reported in the January 7, 1981 amendment.

and three outside public members, who are not members of the Exchange itself. White is one of the three public members. The three outside Board of Governors members have "input" into the decisions of the Board from the perspective of the general public. The Exchange itself functions as a forum and an apparatus for the membership to sell, trade, and purchase contracts for the supply of goods in the future. It is not a business in the orthodox and conventional sense. The Board of Governors meets in New York once a month, except for the summer months, when fewer meetings are scheduled (TR 1730–32, 1741, 1776–77, 1779).

359. It never occurred to White that his appointment to the Board of Governors could have any consequence as far as Section 1.65 was concerned.[113] At the time of his appointment he was aware of Section 1.65, the matter went through his mind, but he believed intuitively that it was not the sort of thing that would have to be reported. Subsequently, after the Section 1.65 issue was added, White mentioned the appointment in discussions with communications counsel (TR 1729–30, 1733–34). In terms of defining "significant change," White explained that if he had been named as a member of the Board of Directors of corporations such as General Motors or Pennsylvania Power and Light, he would have at least brought the matter to the attention of counsel to determine whether it should have been reported (TR 1793–94).

Robert Saner

360. Robert Saner is a partner in the law firm of White, Fine & Verville (TR 2842; Sunrise Ex. 34). His knowledge of Section 1.65 was based upon correspondence received from communications counsel (Sunrise Exs. 15, 16 and 23) and from having read the rule itself. Saner read the rule in August, 1979 in connection with counsel's letter of August, 1979 (Sunrise Ex. 15) which had a copy of the rule attached as an appendix (TR 2845–47, 2887). He understood the rule to mean that it required reporting changes in circumstances that would affect his financial ability to meet his commitment to Sunrise, any change in full-time employment, any change in place of permanent residence or any acquisition of a business interest in the broadcast field. Saner understood that these types of things would be deemed substantial and significant. He interpreted the rule to mean that it would require a look at the particular circumstances so as to determine whether something or some event constituted a substantial or significant change (TR 2849–50).

361. Since December 1978, the date when he became a principal of Sunrise, Saner has made several financial investments which were not reported to the Commission in any form prior to the January 7, 1981

[113] White is not proposed to be integrated into station operations.

amendment. (Sunrise Ex. 35) Specifically, Saner acquired three limited partnership interests in Saxon Funds, which is a limited partnership investing in oil and gas drilling programs. These interests are passive investments, limited non-assessable partnerships. His interest in each limited partnership is less than 1% (TR 2853–55, 2857).

362. In August 1980, Saner became a 40% stockholder and Secretary, Treasurer of Lawry and Associates, Inc.[114] The nature of the business consists of selling historical photography for commercial and design purposes. The business employs one person who works out of her home. Saner's involvement is two-fold; first, it is a hobby; second, it represents an investment for him and his wife (TR 2853–55).

363. It never occurred to Saner that this kind of interest, which from the witness' perspective was an investment and hobby, and which had no significant impact on his net worth or liquidity or his ability to meet his financial commitment, could be significant, material or germane to the proceeding. He had been proposed for integration purposes, Saner would have looked at it in a different view since any interest that might require time might also impinge upon his integration commitment. Further, although the petition to enlarge issues requesting a Section 1.65 issue was filed about the same time that he acquired the photography business interest, that fact did not in any way trigger a connection to the reporting requirement of Section 1.65 (TR 2865–2867). Based on his understanding of Table II, Saner would have reported his interest in Lawry and Associates in Table II had the interest been in existence at the time he became a principal. However, he never understood that the instructions for Table II were the test to be applied as to when an amendment was necessary under Section 1.65 (TR 2873).

364. In early March 1980, Saner first saw the interrogatories propounded by Community. After discussing his Table II information with White, Fine and communications counsel, Saner told communications counsel he had no additional information to report and that there was nothing inaccurate in the information originally provided. In his opinion, as of April 4, 1980, the information contained in Table II pertaining to him was true and correct (TR 2868–70).

Phillip David Fine

365. Blackburn had a general discussion with Fine concerning Section 1.65 and believed Fine was aware of the obligation to file amendments if

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[114] Sunrise also reported in its January 7, 1981 amendment the following changes in Saner's Table II information as originally filed: (1) Flagstaff Lodge Company, Inc. dissolved a few months after December 1978 and Saner thus ceased being a director and a 3 or 4% stockholder (TR 2861, 2880, 2890). (2) Saner resigned as Treasurer of Mott-McDonald Associates, Inc., on June 1, 1980. Saner testified he is still acting Treasurer because a new Treasurer had not yet been appointed (TR 2861–62, 2880–81).

things got significantly better or worse with regard to the application (TR 1847–48). Blackburn also remembered discussing the obligation to report substantial changes with one of Fine's law partners (TR 1847–48). Barbara Tamposi, who discussed Section 1.65 with Fine, felt that he was aware of its requirements (TR 2536–38).[115]

366. Fine acquired the following interests since January 16, 1978:

> . . . a limited partnership interest in Beaver Run Associates, a limited partnership, which interest is less than twenty-five (25%) percent; and an interest in a joint venture known as 133 Associates, which interest is less than twenty-five (25%) per cent; and . . . the sole owner of the house located at 68 Wallace Road, West Hartford, Vermont, referred to in Interrogatory 1b.

The Beaver Run and 133 Federal Street interests were reported in Sunrise's January 7, 1981 amendment, as was the fact that Fine had resigned as managing trustee and become trustee in July 1980 of the Stadium Realty Trust.

Ultimate Findings and Conclusions

1. This proceeding concerns the applications of Merrimack Valley Broadcasting, Inc. (Merrimack); Sunrise Broadcasting Corp. (Sunrise); Gateway Broadcasting Associates (Gateway); and Community Service Broadcasting of Nashua, Inc. (Community) for construction permits for new AM and/or FM stations to replace the deleted facilities of Stations WOTW(AM) and WOTW-FM at Nashua, New Hampshire. Merrimack, Sunrise and Gateway seek authorization for the construction and operation of an AM broadcast station to be operated on frequency 900 kHz, and an FM broadcast station to be operated on frequency 106.3 MHz (Channel No. 292) at Nashua, New Hampshire. Community seeks authorization for construction and operation of only a frequency modulation station at Nashua, New Hampshire. Sunrise is faced with an issue to determine whether it failed to comply with 47 C.F.R. 73.3514 and 47 C.F.R. 1.65 and whether, as a result of evidence adduced concerning this matter, it possesses the requisite qualifications to be a broadcast licensee. Before the Sunrise proposals are entitled to comparative consideration with the other mutually exclusive applicants, this question of compliance with the cited rules must be resolved in its favor. The Commission has over the years emphasized, and the Courts have affirmed, the principle that only basically qualified applicants are entitled to Commission consideration. *Louis Adelman*, 28 FCC 432 (1960); affirmed *sub nom*, *Guinan Realty Company v. FCC*, 111 U.S. App. D.C. 371, 297 F. 2d 782 (1961). According-

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[115] In response to Interrogatory 5a, executed March 1, 1981, however, Fine stated he has no present recollection of having been advised by anyone affiliated with the Sunrise organization that Section 1.65 required Sunrise to advise the Commission, within 30 days, of substantial and significant changes in its application.

ly, it is necessary to resolve the question as to whether Sunrise failed to comply with the requirements of 47 C.F.R. 1.65 and 73.3514 before considering the comparative issue in this proceeding.

2. By *Memorandum Opinion and Order* (FCC 80M–1794), released September 24, 1980, the issues in this proceeding were enlarged to determine whether Sunrise timely disclosed the nature and scope of the business and financial interests of its principals, as required by Section II, Table II of its application in compliance with 47 C.F.R. 1.65 and, if not, the effect of such failure on the basic and/or comparative qualifications of Sunrise. Subsequently, the Presiding Judge enlarged the scope of the issue to include inquiry into Sunrise's compliance with 47 C.F.R. 73.3514.[116] Sunrise, in opposing the request to enlarge the issues, had argued that the unreported real estate interests of the Sunrise principals are not of such decisional significance as to warrant specifying the issue. The Presiding Judge, in enlarging the issues on the basis of the facts then before him, noted that the matter should be explored through the hearing process. Sunrise, in its "Reply to Proposed Findings of Fact and Conclusions of Law," filed August 28, 1981, acknowledges that the question of "decisional significance" as it related to 47 C.F.R. 1.65 could not be determined at the time that the enlargement request was considered. This is frequently the case in adjudicatory matters. Only after full exploration through the hearing process is it possible to resolve material questions of fact. Now that full exploration has been had through the hearing process and all of the parties to this proceeding have had an opportunity to explore the matter fully and express their views as to what the record evidence establishes, the Commission is in a position to resolve this question. It is ruled, for the reasons set forth, *infra*, that the evidence does not warrant the conclusion that there was intentional concealment by the Sunrise principals.

3. 47 C.F.R. 73.3514, in pertinent part, provides that each application filed with this Commission shall include all information called for by the particular application form, unless the information called for is inapplicable. The Sunrise applications to construct new AM and/or FM broadcast stations were filed on FCC Form 301. Page 4 of Section II of Form 301 is Table II. The instructions to Table II explain that its purpose "is to obtain information concerning the occupation, business and financial interests, at the present time and during the past 5 years, of the applicant and of each party to this application, named in Table I."[117] Table II instructions provide that, with respect to each individual listed as a principal in

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[116] *Memorandum Opinion and Order* (FCC 81M–163), released January 21, 1981.

[117] Page 3 of Section II of Form 301 is Table I. Column (a) of Table I seeks information identifying all officers, directors and members of a corporate applicant's governing board. Where a corporate applicant has 20 or fewer shareholders, all shareholders are to be identified in column (a) of Table I. Since Sunrise had fewer than 20 shareholders, all of the stockholders were listed in Table I.

column (a) of Table I, the applicant is to state the principal occupation and business in which each party named is engaged in at the present time or has been engaged in at any time during the past 5 years, and, in addition, state any other business or financial enterprise in which such party has now or within the past 5 years has had either a 25% or greater interest or any official relationship. The Table II instructions also require that in each case the firm name should be furnished, as well as the principal place of business and the nature of the business engaged in by that firm. As noted by the Bureau, one of the purposes of Table II is, *inter alia*, to elicit information necessary to evaluate an applicant's compliance with the Commission's cross-interest policies and cross-ownership rules.[118] As noted by the adversary applicants, disclosure in Table II is essential relative to the evaluation of the applicant's integration commitment as well as the possible impact on the financial resources of the principals of the applicant.

4. The record establishes that the applications as filed correctly and accurately reported the interests of Barbara Tamposi, James Tamposi, Lee White and Robert Saner. As of January 1978, Phil David Fine held a 50% interest in a real estate joint venture known as Phil-Max Associates, and was a co-trustee of Allu Realty Trust, the shares of which were owned by Hi-G, Inc. Neither were listed in Table II.[119] Fine was not proposed to be integrated into the stations's operations. This failure was clearly inadvertent. There was no intent to conceal or mislead this Commission. The record further establishes that as of the time of the filing of the permit applications Samuel Tamposi, Jr. (Sam Tamposi) held a beneficial interest of less than 25% in several trusts; was a trustee and/or co-trustee of the Northeast Realty Trust, the Tamposi Family Trust of July 25, 1977 and the Peter-Sam Trust. He was also a trustee of three "Clifford Trusts" and a marital deduction trust. None of these interests were disclosed in Table II.[120] Similarly, at that time Sam Tamposi held interests of 25% or more in a number of real estate investment ventures; namely, Round Pond, Anders Lane, Parish Hill, Hills Ferry, Crestwood City Realty and Sims Street. These interests were not disclosed in Table II. The contention that the listing "Samuel A. Tamposi Real Estate" was sufficient to encompass all of these real estate interests is rejected as without merit. Such a listing merely alerted the Commission to the fact that Sam Tamposi was engaged in the real estate business. It cannot reasonably be construed as informing the Commission that he held extensive real estate investments, which

[118] *Brindlee Broadcasting Corp. et al.*, 46 F.C.C. 2d 721 (Rev. Bd. 1974).

[119] It should be noted, however, that Hi-G, Inc. was listed in Table II.

[120] However, it must be noted that Sam Tamposi's percentage interest in the Northeast Realty Trust, the Tamposi Family Trust and the Peter-Sam Trust were reported in a balance sheet submitted with the applications

he considered as partnerships.[121] It is ruled that those interests should have been disclosed.[122]

5. It is recognized that neither the instructions to Table II or the Commission's Rules define the term "official relationship." Extensive evidence was adduced as to the legal advice, if any, that was given the Sunrise principals as to whether a trusteeship relationship was required to be reported in Table II. Sam Tamposi was of the belief that such relationship did not have to be reported. There is no evidence that he intentionally concealed such relationship from the Commission.

6. At the time of preparing the applications, the complexity of the Tamposi real estate interests caused counsel concern and, recognizing that the information was not as complete as he would have liked it, directed that complete information be obtained from Sam Tamposi's accountant. The record does not support the contention that Sam Tamposi, because of the press of time, knowingly submitted incomplete information. On the contrary, the record establishes that Sam, applying the "active involvement" test, believed that he was making full disclosure.[123]

7. The Sunrise principals were neophytes to the broadcast industry with no background or knowledge as to the requirements of this Commission. Barbara Tamposi, Samuel Tamposi and James Tamposi, as well as the then counsel for Sunrise, candidly testified to the best of their recollection as to the facts surrounding the preparation of Table II in January 1978. Understandably, their recollections did not coincide with respect to all matters dealt with at that time. The passage of time has a way of playing tricks with one's recollection and it is not surprising that their recollections did not coincide completely on all of these matters. The Presiding Judge carefully observed these individuals during their testimony and concludes that they were forthright and candid. No significance is attributed to the fact, as argued by Community, that there was a degree of divergence in the testimony of the Tamposis and counsel as to the advice given by counsel at the time of the preparation of the applications.[124] After a full inquiry it can now be concluded that those interests which Samuel Tamposi failed to report in the applications, as initially

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[121] Many of these were joint ventures with no written partnership agreement in existence.

[122] Had there been such disclosure, counsel for the other applicants would have been in a position to explore during the initial hearing in this case what impact, if any, these investments would have on Sam Tamposi's integration commitment.

[123] The record does not support the contention that Sam Tamposi was warned, prior to the filing of the applications, that his Table II information, as submitted, was incorrect. The record is devoid of evidence establishing that there were unreported interests of those individuals who were Sunrise principals at the time of the filing of the permit applications but who later withdrew.

[124] As acknowledged by Sunrise in its Reply, it is "reasonable and logical" to conclude that the reporting requirements of Table II and, more particularly, the language "any official relationship" encompasses trusteeships and joint ventures. However, since it is concluded that the failures to initially report such interests was not intentional, it is not necessary to rule specifically on this question.

filed, did not adversely impact on his financial ability to meet his commitment to Sunrise or his integration commitment.

8. It is concluded that the failure of Sunrise to fully comply with the requirements of 47 C.F.R. 73.3514 resulted from a misunderstanding and not from a conscious effort to withhold information from the Commission. At most, a slight comparative demerit must be assessed.

9. Section 1.65, 47 C.F.R. 1.65, provides that each applicant is responsible for the continuing accuracy and completeness of the information furnished in its pending application. More particularly, 47 C.F.R. 1.65 requires that whenever the information furnished in the pending application is "no longer substantially accurate and complete in all significant respects" the applicant shall, as promptly as possible, and, in any event, within 30 days unless good cause is shown, amend the application to furnish such additional information as may be appropriate.[125]

10. As noted by the Bureau, 47 C.F.R. 1.65 essentially imposes two separate reporting requirements upon an applicant. One is that the information in an application be kept accurate and complete in all significant respects and the other is the requirement that the applicant inform the Commission of substantial changes regarding any matter when such changes may be of decisional significance. The findings establish that there were a number of business and financial interests of the principals of Sunrise which should have been timely reported to the Commission, pursuant to the requirements of 47 C.F.R. 1.65.

11. The Presiding Judge recognizes that the basic business of both Barbara and Samuel Tamposi was real estate investment and development and that James Tamposi, to a lesser extent, was also engaged in this activity. Their failure to report the numerous changes in their business interests resulted from their understanding that they only had to report changes which would adversely affect their comparative posture in this proceeding and also their initial misunderstanding as to what interests had to be reported in Table II.[126]

12. The numerous real estate ventures undertaken by the three Tamposis and not timely reported to this Commission are detailed in the findings. Sunrise argues that these financial interests constituted "pure investment or speculative ventures" which were "personal passive investments" which were an extension "generically" of the real estate interests initially reported in Table II and, therefore, were clearly not of "decisional significance." However, the conclusion that the acquisition of these business and financial interests did not adversely impact on the Tamposis

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[125] *Reporting of Changes Substantially Affecting Applications*, 29 FR 15516, 3 RR 2d 1622 (1964).

[126] For the reasons set forth, *supra*, relative to Sam Tamposi, the Presiding Judge rejects the argument that all of Barbara Tamposi's real estate investments were encompassed within the listing "Betty Tamposi Real Estate."

integration commitment could only be reached after extensive inquiry through the hearing process.[127]
The competing applicants were given full opportunity to explore the impact, if any, these more recently acquired interests would have on the ability of the Tamposis to meet their integration commitments or their financial commitments. In view of the fact that the failure to comply with 47 C.F.R. 1.65 resulted from a misunderstanding of the requirements of the cited rule, it is concluded that disqualification is not warranted. The record evidence warrants the assessment of a slight demerit because of this rule violation.

13. The contention that Sunrise intentionally misrepresented when it filed its response to interrogatories is rejected. When questioned whether the information in the applications was true, accurate, complete and correct, Sunrise responded that it had no basis for believing that its applications, as amended, contained untrue information. The record establishes that the principals of Sunrise believed the response to be true and that they did not intend to mislead or dissemble in so responding.[128]

14. Turning to the comparative choice to be made in this proceeding, it is appropriate to keep in mind the objectives of the comparative process as they have been enunciated by the Commission in the past.[129] The Commission in its *Policy Statement of Comparative Broadcast Hearings*, 1 FCC 2d 393, 398; 5 RR 2d 1901 (1965), emphasized that the two primary objectives to be accomplished in making the comparative choice are to obtain the best practicable service to the public and to achieve maximum diffusion of control over the media of mass communications.

15. The importance of the diffusion of mass media control has been stressed by the Commission in the past and need not be the subject of extensive discussion. None of the applicants have any media interests and, with the exception of Martin Nankin, the director and 9% stockholder of Community, none of the other stockholders has any media interests. There must be attributed to Nankin a 50% ownership interest in Business Publications, Inc. which publishes the *New Hampshire Business World*, a monthly newspaper devoted to business news in New Hampshire.[130] This monthly newspaper has a circulation of approximately 14,000, most of which is in New Hampshire, and a Nashua circulation of

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[127] The Presiding Judge agrees with the Bureau that nothing in the record of this proceeding indicates that these business acquisitions adversely impacted upon Sunrise's comparative posture.

[128] *Millard Orick, Jr.*, FCC 82R–16, released March 30, 1982; *Muncie Broadcasting Corporation*, FCC 82R–9, released March 5, 1982; *Garrett, Andrews & Letizia, Inc.*, 86 FCC 2d 1172, 1180 (Rev. Bd. 1981)

[129] The applicants agree that the sequence of grants should be that the best qualified applicant is awarded the FM facility and the next best applicant is awarded the AM facility.

[130] kBy amendments filed subsequent to the cut-off date, Nankin disposed of his interest in Business Publications, Inc. However, for comparative purposes, this media interest must be attributed to him; otherwise an impermissible advantage would accrue to Community.

about 750–1000. Nankin is also director of Cobbleston Publishing, Inc., which publishes a monthly history magazine for children with about 10,000 subscribers.[131] These media interests of Nankin result in assessing a very slight demerit against Community relative to the diversification factor.

16. Community argues that since Merrimack, Sunrise and Gateway have all applied for an AM as well as an FM facility in Nashua that they must "accept the consequences" of this action. Community contends that these three applicants must each receive a substantial demerit under the diversification factor because of the pendency of their AM proposal. Community cites a footnote in the Commission's *Memorandum Opinion and Order* denying a petition for reconsideration in the *Webster-Baker* proceeding.[132] The Commission in the cited proceeding ruled that in evaluating comparative factors account would be taken of the fact that simultaneous grants were to be made for both AM and FM facilities sought by the applicants. The Commission, in footnote 5, went on to hold that the policy of ingnoring pending applications in evaluating diversification was inapplicable in that proceeding where the applications were to be acted upon simultaneously in the same proceeding. Community's interpretation of the Commission's language is not adopted. The Presiding Judge is of the view that the Commission in the *Webster-Baker* case was indicating that, after it had determined which of the parties would be awarded the grant of one of the broadcast facilities, the fact of such grant would be taken into account under the diversification of the media criterion in assessing the successful applicant's comparative position for the remaining facility. The Commission has historically ruled that pending applications would not be considered in making a determination with respect to the diversification of the mass media. The Presiding Judge does not believe that the Commission intended to establish a procedure whereby the pendency of the Merrimack, Sunrise and Gateway AM applications would be given consideration under the diversification factor when making the initial choice as to which applicant would best serve the public. Community's contention is rejected.

17. Effectuation of the "best practicable service to the public" objective entails the appraisal of the proposed participation of the applicants' principals in the operation of the proposed facilities, as well as the effective use of the frequency. This criterion is best measured through the aspect of ownership participation in the day-to-day operation of the station, a quantitative consideration subject to qualitative enhancement by such factors as the local residence of the principals, their participation

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[131] Nankin has no ownership interest in Cobblestone Publishing, Inc. and his wife's 20% interest cannot appropriately be attributed to him.

[132] *Webster-Baker Broadcasting Co.*, 71 FCC 2d 334, 336 (1979).

in community affairs in the proposed city of license, and their previous broadcast experience. Day-to-day participation in the operation of the station by minority and/or female principals is also a matter of qualitative enhancement.

18. Addressing the matter as to the effective use of the frequency, the findings establish that the primary service contour of the Gateway FM proposal would serve 111,674 persons more than the other FM proposals.[133] All of the population in this area served by Gateway's FM proposal but not by the others would receive no fewer than 5 primary aural services. On the basis of these facts, it is concluded that Gateway is entitled to a very slight preference in this area of comparative consideration. *Barnes Enterprises, Inc.*, 69 FCC 2d 1957, 1962 (Rev. Bd. 1978.[134]

19. Seven stockholders of Merrimack, owning a total of 67.95% of the stock, will hold the following full time management positions: Joseph G. Sakey (17.95%), general manager; Paul R. Shea (14.1%), station manager; Thomas B. Kelley (6.41%), general sales manager; Pauline E. Anderson (10.26%), community affairs director; Vincent F. Servello (6.41%), marketing director/sales; Patricia M. Thurber (6.41%), minority affairs director; and Selma R. Pastor (6.41%), women's affairs director. The other applicants have attacked the full time integration proposal of Merrimack. The contention of Sunrise that it is impossible to have any confidence that Merrimack will operate its proposal for a signficant period of time is rejected as is the contention that the staff plan involving 14 full time employees is unrealistic. The record does not support the contention that the seven Merrimack principals will not, in fact, devote their full time and attention to the various full time positions to be assumed by them. Similarly, the record does not support the contention that no other station of similar size has full time directors of women's affairs, community affairs and minority affairs. The three female principals who will undertake these duties and the other 4 principals have evidenced a sincere intention to devote full time to the operation of the proposed station and this commitment is given full faith and credit. There is no reason to question their sincerity and intention to carry out the duties encompassed by the positions they have accepted. The contention that the Merrimack integration proposal is not likely to be implemented or sustained is rejected.

20. Three of the Sunrise principals, owning a total of 70% of the stock, will devote full time to the operation of the station. These individuals will hold the following management positions: Barbara A. Tamposi (24%), general manager; Samuel A. Tamposi, Jr. (23%), sales manager; and

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[133] Gateway would serve 409,746 persons in an area of 660.7 miles, whereas the other FM proposals would serve 298,072 persons in an area of 534.7 square miles.

[134] Since all of the applicants propose auxiliary power equipment, this is not an area for comparative preference.

James N. Tamposi, Jr. (23%), director of news and public affairs.[135] Community questions whether the Tamposis are serious about their full time commitment to Sunrise, arguing that their participation in Sunrise represents just another investment on their part. This contention is rejected. These three young people evidenced a sincere interest in the broadcast proposal and no evidence was developed which would undermine their full time commitment to the operation of the proposed broadcast facility.

21. Gateway is a limited partnership with Mario DiCarlo, the 70% general partner, proposed as the full time general manager and Norman Kruglak, a 10% general partner, proposed as the full time general sales manager. Augusta Hornblower and Ada Harkaway, who are each a 10% limited partner, propose to be the full time traffic/sales manager and the public affairs and news director, respectively. The Presiding Judge agrees with the contentions of the other applicants that the integration proposal of Augusta Hornblower and Ada Harkaway can be given no comparative consideration in the overall evaluation. Both are limited partners and, as such, have no ownership participation in the management of the applicant. Gateway's Articles of Limited Partnership provide that the general partners shall have full, exclusive and complete discretion in the management and control of the business and affairs of the partnership and that they are to make all of the decisions affecting the partnership's affairs and business. The Articles further provide that the limited partners shall not take part in the management of the business or transact any business for the partnership. It is clear that Augusta Hornblower and Ada Harkaway are required to maintain "a purely passive role" relative to the Gateway partnership. *Anax Broadcasting Incorporated*, 87 FCC 2d 483, 488 (1981). The Commission in the *Anax* case emphasized that it is not appropriate to consider the interests of limited partners as relevant in determining "integration credit." The same reasoning is applicable in this case and, for this reason, no credit is given to the integration proposals of Augusta Hornblower and Ada Harkaway.[136]

22. The argument that Gateway has failed to demonstrate the practicality of its proposal because of the various provisions in the limited partnership agreement is not persuasive. These specific provisions are set forth in the findings and it is noted that while there are some ambiguities relative to resolving any differences between the general partners, it is clear that DiCarlo and Kruglak, the general partners, have a clear concept of what they wish to accomplish and it is not anticipated that

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[135] The principals of Sunrise intend to employ a station manager who will report to Barbara Tamposi, the general manager.

[136] Unquestionably, these two individuals were sincere in making their full-time commitment. However, the specific provisions of the limited partnership make clear that they are entitled to have no voice in the management or control of the partnership. Any say that they might have would be purely at the sufferance of the general partners.

there will be any serious question as to the functional ability of the partnership. The record does not support the contention that the provisions of the partnership will prevent decision making and result in a deadlock. While it is true that only DiCarlo to date made any cash contribution to the partnership, it is clear that the other partners recognize and acknowledge their *pro rata* obligation for capital contribution. This fact does not bring in question the viability or legality of the partnership.

23. Three stockholders of Community, owning 58% of the voting stock, will hold the following full time positions: Peter Ferrand (23%), general manager and program director; Jane A. Bangert (20%), assistant general manager and news/public affairs/community relations director; and Edward Lithgow (15%),local sales manager and sports director. At the time of the hearing Community proposed that James T. Walsh (9%) and Martin Nankin (9%) would each devote a minimum of 20 hours a week to the proposed operation. Nankin's part-time participation was to be as national regional sales director and Walsh was to devote as least 20 hours a week to local sales and daily stock market reports and commodity news. However, in a "Motion for Leave to Amend," filed January 29, 1982, Community reported that Walsh had moved to California and that Community no longer claimed credit for his part-time integration proposal.[137] A question has been raised as to whether the commitment of Nankin for a minimum of 20 hours a week was made before the cut-off date. According to Ferrand, the president of Community, Nankin's commitment of 20 hours a week was made subsequent to the cut-off date. Ferrand believes that the commitment was made sometime after February 1979. Lithgow, another Community principal, had no recollection of when Nankin made his commitment to work 20 hours a week. However, he recalled that at the time the December 13, 1978 amendment was prepared (just prior to cut-off) that Nankin had committed to devote "less than 20" hours per week to the proposal. In light of this, it is ruled that credit will not be given for Nankin's part-time integration proposal.

24. The other applicants have argued that Community should be only given credit for 43% of the full-time integration, noting that while Ferrand, Bangert and Lithgow, in the aggregate, own 58% of the Class A voting stock, they own, in the aggregate, only 43% of the total stock of the corporation. The Class A voting stock totals 100. The class B non-voting shares total 180. Out of a total 280 shares Ferrand, Bangert and Lithgow would each own 40 shares, which, in the aggregate, represents approximately 43% of all of the stock of the corporation. Since Community has the smallest percentage of ownership devoted to full-time integration, it is not necessary to dwell on this question at length other than to agree

[137] *Order* of the Presiding Judge (FCC 82M–0771), released March 9, 1982.

with the other applicants that the equity ownership of Community is such that it is appropriate to rule that a "slight reduction" in Community's integration credit is warranted. *Robert M. Zitter*, 59 FCC 2d 274, 37 RR 2d 299, 305 (Rev. Bd. 1976) A description more precise than "slight" is not necessary, since Community comes in last quantitatively with respect to the integration factor.

25. In summary, it is concluded that Gateway, with 80% integration stands first relative to the quantitative aspect of integration and is followed by Sunrise with 70%, Merrimack with 67.95% and Community with 58%.[138] It is appropriate to address the question as to the extent to which this quantitative consideration is subject to qualitative enhancement or diminution by such factors as the local residence of the principals of the applicants; their participation in community affairs in the proposed city of license; their previous broadcast experience and ownership by minority or female principals who are to be integrated into the day-to-day operation of the proposed facility. The impact of this qualitative analysis, of necessity, varies with the particular facts of each case.[139] The integrated Gateway principals, Mario DiCarlo (70%) and Norman Kruglak (10%), have never resided in Nashua and, as a result, have never been active in any Nashua civic, fraternal or charitable organizations. DiCarlo is a resident of Newton, Massachusetts. He does not plan to move to Nashua; rather, he will commute daily in the event Gateway receives a broadcast facility. Kruglak, on the other hand, who presently lives in Needham, Massachusetts, will move to Nashua in the event of a grant to Gateway.[140] Kruglak has had extensive broadcast experience at Station WILD, Boston, Massachusetts.[141] He was its general manager for a period of time (late 1966–69) and general sales manager for approximately eight years (1969–1977). DiCarlo was president and director of Kotcom Broadcasting, Inc., licensee of Station WCOD–FM, Hyannis, Massachusetts from August 1973 to July 1977. He never owned stock in the licensee. He held a convertible debenture and considered himself an investor. He did not work at the station on a daily basis. However, he helped guide the station in financial matters. It is concluded that DiCarlo's broadcast experience is of a limited nature. The lack of local residence and participation in Nashua civic, fraternal and eleemosynary organizations seriously erodes the

[138] As noted, *supra*, a "slight reduction" in Community's integration credit is warranted.

[139] It is well established that qualitative attributes of participating owners may not overcome a clear quantitative difference. *Scott and Davis Enterprises, Inc.*, 88 FCC 2d 1090 (Rev. Bd. 1982). While Community might be considered to fall in this category, qualitative evaluation will be made of all the applicants for the benefit of reviewing authority.

[140] Proposed future local residence is accorded less weight than residence of several years duration. *Policy Statement*, *supra*.

[141] The Commission, in its *Policy Statement*, recognized that emphasis upon the element of past broadcast experience could discourage newcomers to broadcasting. As a result, it ruled that it is to be deemed of "minor significance."

quantitative superiority that it has over its adversaries. Additionally, as detailed in the findings, paras 173–185, Gateway failed to comply with the requirements of 47 C.F.R. 1.65 in that it failed to report timely the change of employment of Norman Kruglak and Augusta Hornblower and the change in Ms. Hornblower's residence. Since it is concluded that these failures were unintentional, only a slight demerit will be assessed against Gateway for such failure.

26. The three Sunrise principals who will be fully integrated into the station's operations are Barbara A. Tamposi (24%), Samuel A. Tamposi, Jr. (23%) and James N. Tamposi, Jr. (23%). Their interests aggregate 70%. All three have been residents of Nashua or its immediate environs with the exception of a period of time they were attending school. All three are young and have no broadcast experience. Ms. Tamposi has served as an elected representative to the state legislature of New Hampshire and is a member of a number of civic and business organizations. Samuel A. Tamposi, Jr. has been active in the Nashua Jaycees, the Rotary and the Boy Scouts of Nashua. Additionally, he has been active in the Nashua Chamber of Commerce and the local YMCA. James N. Tamposi, Jr. has been active in the Nashua Chamber of Commerce and several realty associations. More recently he has been attending Boston College Law School. All three of these individuals, as detailed in the findings, have extensive real estate investments. The 24% ownership by Barbara Tamposi, a female, also is a factor in Sunrise's favor.

27. The Merrimack proposal involves 67.95% integration by seven of its principals. Joseph G. Sakey (17.95%), is a resident of Lexington, Massachusetts. He was assistant director of the Nashua Public Library from 1956–1959. He was director from 1959–1971. He left Nashua in 1971 to become director of the library system in Cambridge, Massachusetts. During this period of time (1956–71) he was a member and officer of a variety of civic, community and state boards and commissions. In the event of a grant he will move to Nashua. Paul R. Shea (14.10%) presently lives in Lexington, Massachusetts and will move to Nashua in the event of a grant. He has not been active in any Nashua organizations. Thomas B. Kelley (6.41%) has lived in Nashua since 1968. He has been a member of the Board of Aldermen of Nashua, past president of the Nashua Humane Society and a member of the Board of Directors of the Greater Nashua United Way (1974 to present) and a member of the Rotary Club. Pauline E. Anderson (10.26%) has resided in Nashua since 1955. She served from July 1977 to January 1978 as alderman from Ward 4 in Nashua. She has been active in numerous civic, religious and eleemosynary organizations in Nashua over the years. Vincent F. Servello (6.41%) lives in Merrimack, New Hampshire and has not been active in any Nashua organizations. Patricia M. Thurber (6.41%) has been a resident since 1967. She has an impressive record of participation in civic and eleemosynary organiza-

tions in Nashua. Selma R. Pastor (6.41%) has been a resident of Nashua since 1967. She has an impressive record of participation in civic and eleemosynary organizations in Nashua. Selma R. Pastor (6.41%) has been a resident of Nashua since 1952. She has been involved in numerous volunteer activities in Nashua and participated in various local organizations such as the Girl and Boy Scouts and the YMCA. She served on the Nashua Board of Education for four years in the early 1970s and in March 1978 was appointed a commissioner of the Nashua Housing Authority. She was elected to the New Hampshire House of Representatives. None of the Merrimack principals who are to be integrated into the operation of the proposed facility have any broadcast experience.

28. Two of Community's integrated principals, namely, Peter Ferrand (23%)[142] and Jane Bangert (20%) are residents of Nashua. Edward Lithgow (15%), the other integrated principal, lives in Peterborough, New Hampshire. Ferrand's broadcast experience is detailed in the findings. At no time did he hold a management level position at any of the broadcast stations where he was employed. Jane A. Bangert, a resident of Nashua, has been active in a number of civic and charitable organizations in Nashua over the years and has been active in politics. Edward Lithgow was active with Station WSRB while attending Springfield College and was sports director and salesman at radio Station WSCV/WSLV, Peterborough from 1972–1976. He broadcast high school baseball, basketball and soccer games. He has not held any management positions in a broadcast station.

29. While Gateway's 80% full-time integration is greater than the others, it is not disproportionally superior to Sunrise with 70% and Merrimack with 67.95%.[143] However, the difference in relative qualitative enhancement weighs heavily in favor of Merrimack and Sunrise and offsets Gateway's quantitative superiority. Merrimack would have seven of its principals active in the day-to-day operation of the station and three of these are females and residents of Nashua who have outstanding records of civic involvement in the community. The Sunrise principals who would be active in day-to-day management and operation of the station are all Nashua residents. These three are in their twenties and have not amassed as outstanding a record of participation in local Nashua organizations. It is concluded that Merrimack ranks number one and

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[142] Ferrand has committed himself to full-time participation in station affairs.

[143] Community, with a maximum of 58% full-time integration, comes in last in this area of comparison. Moreover, as noted, *supra*, this integration credit is subject to a "slight reduction" because of Community's equity structure. While two of Community's principals (Ferrand) and (Bangert) are residents of Nashua, the superior posture of the other three applicants from a quantitative aspect warrants a conclusion that any qualitative enhancement Community might enjoy cannot change its last place ranking as to the integration factor. *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944 (Rev. Bd. 1982). As noted, *supra*, Community has been assessed a slight demerit with respect to media diversification.

Sunrise number two with respect to the integration of ownership factor. Under the facts of this case this factor is controlling. No demerits have been assessed against Merrimack and the slight demerit assessed against Sunrise with respect to the violations of 47 C.F.R. 1.65 and 47 C.F.R. 73.3514 are not sufficient to outweigh its superiority over Gateway and Community in this area of comparative evaluation.[144]

30. In summary, it is concluded that the public interest would best be served by grant of the FM proposal to Merrimack and grant of the AM proposal to Sunrise.

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party or the Commission reviews this Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Merrimack Valley Broadcasting Company, for a new FM Station to operate on 106.3 MHz at Nashua, New Hampshire (File No. BPH–10,926), IS GRANTED; the application of Sunrise Broadcasting Corp. for a new Standard Broadcast Station to operate on 900 kHz at Nashua, New Hampshire (File No. BP–21,102), IS GRANTED, and the applications of Merrimack Valley Broadcasting, Inc. (File No. BP–21,101), Sunrise Broadcasting Corp. (File No. BPH–10,925), Gateway Broadcasting Associates (File Nos. BP–21,103 and BPH–10,928) and Community Service Broadcasting of Nashua, Inc. (File No. BPH–10,927) ARE DENIED.[145]

FEDERAL COMMUNICATIONS COMMISSION

Thomas B. Fitzpatrick
Assistant Chief Administrative Law Judge

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[144] Gateway's very slight preference for comparative coverage superiority is offset by the slight demerit it suffered because of the 47 C.F.R. 1.65 violation.

[145] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its motion, this Initial Decision shall become final within 50 days after its public release, pursuant to 47 C.F.R. 1.276(d).

Comparative Criteria
Ownership and Management, Integration of

Where two comparative proposals for FM station are so nearly equal that the only decisionally significant difference is that one applicant proposes the full-time integration of a female 49% owner as general manager while the other lacked any female integration, the Review Board summarily affirmed grant of the application having female integration.

-North Carolina Radio Service, Inc.
BC Docket No. 81–244

FCC 82R–67

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
NORTH CAROLINA RADIO SERVICE, INC. Elizabeth City, North Carolina	BC Docket No. 81–244 File No. BPH–800201AN
CAMPBELL BROADCASTING, INC. Elizabeth City, North Carolina	BC Docket No. 81–245 File No. BPH–800828AJ
TOWN & COUNTRY BROADCASTING, INC. Elizabeth City, North Carolina	BC Docket No. 81–246 File No. BPH–800829AF
For Construction Permit for a New FM Station	

Appearances

Eugene F. Mullin and *Nathaniel F. Emmons*, on behalf of North Carolina Radio Service, Inc.; and *David Meyers* and *Steven J. Pena*, on behalf of Town & Country Broadcasting, Inc.

DECISION

Adopted: November 18, 1982;Released: November 23, 1982.

BOARD MEMBER JACOBS FOR THE REVIEW BOARD:

1. With presiding Administrative Law Judge (ALJ) John H. Conlin's dismissal of Campbell Broadcasting, Inc.'s application at its own request,[1] we have before us a two-party comparative broadcast proceeding in which the proposals are so nearly equal that the ALJ concluded that the only decisionally significant difference was that North Carolina Radio Service, Inc. (NCRS) proposes the full-time integration of a female 49% owner as general manager while Town and Country Broadcasting, Inc. (T&C) lacks any female integration. NCRS and T&C seek authority to construct a new FM broadcast station (channel 244A) at Elizabeth City, North Carolina. Both propose 100% full-time integration of their owners into significant management roles, and neither applicant has any other media interests. In reaching his decision, the ALJ noted that T&C's principals had approximately 20 years of full and part-time broadcast experience, compared to NCRS' 8 years of full-time experience and 8 years of part-time experience, but found that NCRS' experience was "broader" and concluded that these "minor transitory differences" were insufficient under the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396, 5 RR 2d 1901, 1910 (1965), to justify a preference for either party. I.D., Conclusions, para. 2. That left NCRS' 49% female integrated ownership as the only arguable difference between the applicants, and the ALJ concluded that this was a sufficient basis on which to grant NCRS' application. *Id.*, para. 3.

2. In its exceptions, T&C concedes that NCRS is entitled to at least a slight preference for female participation but argues that this preference is decisively outweighed by preferences that T&C allegedly deserves for superior past broadcast experience and its principals' long time residency in North Carolina (outside the proposed community of license and the proposed service area of the station). The Board has carefully considered the Initial Decision in light of these contentions, NCRS' reply, and our examination of the record (oral argument was not requested). We adopt the findings of fact in the Initial Decision as an accurate reflection of the record evidence and summarily affirm the ALJ's conclusion that grant of NCRS' application would better serve the public interest, convenience, and necessity.

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[1] Initial Decision (I.D.), FCC 82D–38, released May 14, 1982, Preliminary Statement, para. 1.

3. In a comparative integration analysis, previous broadcast experience is an enhancement factor of "minor significance". *Policy Statement, supra.* Where, as here, length of experience is pitted against breadth but both applicants present fairly similar credentials on both points,[2] the enhancements are essentially offsetting, and we cannot gainsay the ALJ's conclusion that no basis for a preference exists. *See Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 956, 50 RR 2d 1142, 1151 (Rev. Bd. 1982). And it is beyond peradventure that T&C is entitled to no enhancement credit for its principals' out-of-service-area North Carolina residency. *Policy Statement, supra; cf. Community Broadcasting Service, Inc.*, 2 FCC 2d 53, 61, 6 RR 2d 589, 604 (Rev. Bd. 1965). Finally, while T&C correctly asserts that the enhancement credit awarded for female participation is less than that accorded minority participation, citing *Radio Gaithersburg, Inc., supra*, 72 FCC 2d at 829, 45 RR 2d at 1715, it draws the erroneous conclusion that, therefore, NCRS cannot be accorded more than a slight merit or preference for its advantage here. It is true that the Commission customarily speaks about female enhancement "merit" or "credit," rather than a "preference." *E.g., Alexander S. Klein, Jr.*, 86 FCC 2d 423, 432, 49 RR 2d 606, 613 (1981) (merit); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 846, 50 RR 2d 1117, 1130 (Rev. Bd. 1981) (credit). However, in the context of this case the choice of word is academic. NCRS is entitled to a moderate enhancement merit or credit based on the size of its female ownership (49%) and the importance of the managerial position (general manager).[3] *Cf. Alexander S. Klein, Jr., supra*, 86 FCC 2d at 432, 49 RR 2d at 613 ("slight" merit for 5% female ownership interest of proposed business manager). This is a more than adequate integration "edge" over T&C, which lacks any enhancement merits or credits at all, and fully warrants grant of NCRS' application. *See Sacramento Broadcasters, Inc.* v. *FCC*, 236 F.2d 689 (D.C. Cir. 1956).

4. ACCORDINGLY, IT IS ORDERED, That the application of North Carolina Radio Service, Inc. (File No. BPH–800201AN) for a con-

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[2] We reject T&C's contention that broadcast experience gained at a carrier current radio station is not entitled to full credit. *See Poet's Seat Broadcasting, Inc.*, 78 FCC 2d 1080, 1085 n. 9, 47 RR 2d 1265, 1269–70 n.9 (Rev. Bd. 1980); *Radio Gaithersburg, Inc.*, 72 FCC 2d 820, 827, 45 RR 2d 1709, 1714 (Rev. Bd. 1979). We also reject T&C's exception to the ALJ's failure to make all of its requested specific findings of fact pertaining to its principals' previous broadcast experience. The decisionally significant facts are adequately set forth or subsumed in the ALJ's findings and conclusions.

[3] T&C's assertion that enhancement credit for female participation is conditioned upon a showing of increased program diversity attributable to that participation is contrary to established Commission precedent and is rejected. *Cf. Gainesville Media, Inc.*, 72 FCC 2d 799, 805, 43 RR 2d 604, 611 (Rev. Bd. 1978). Also, while we take official notice, on our own motion, of a May 1982 study prepared for the Commission by ELRA Group, Inc. of East Lansing, Michigan, entitled "Female Ownership of Broadcast Stations," the Commission has taken no action on this study, and, thus, existing precedent on female enhancement credit remains unaffected. In the FM service, the study concludes that women are majority owners of 9% of FM stations but have some degree of ownership interest in 69.4%. No comparative data for prior years is provided and no conclusions are drawn about female ownership trends or the policy implications of the study.

struction permit to establish a new FM station at Elizabeth City, North Carolina, IS GRANTED; and that the application of Town & Country Broadcasting, Inc. (File No. BPH–800829AF) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jerold L. Jacobs
Member, Review Board

Common Carrier, Contract With Another Carrier
Common Carrier, Specialized Services
Declaratory Ruling
Petition for declaratory ruling granted. Extended area agreement does not apply to division of revenues for the origination or termination of Execunet service.
-NW Bell Telephone Co.

FCC 82–514

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Petition of Northwestern Bell Telephone Company for Declaratory Ruling	

MEMORANDUM OPINION AND ORDER

(Adopted Novembr 18, 1982; Released November 29, 1982)

BY THE COMMISSION:

1. On November 10, 1981, Northwestern Bell Telephone Company ("NW Bell") filed a Petition for Declaratory Ruling with this Commission. That petition asked this Commission to determine that certain NW Bell local exchange facilities are being used by the Northwest Iowa Telephone Company ("NW Iowa") and MCI Telecommunications, Inc. ("MCI") "as an integral part of an end-to-end interstate MTS/WATS-type Other Common Carrier (OCC) communications service and that such use is jurisdictionally interstate." That petition essentially asked that we find the extended area agreement between NW Bell and NW Iowa is not applicable to the use of NW Bell facilities for the origination or termination of MCI's Execunet service.

2. On July 7, 1982, NW Bell filed a petition with this Commission entitled "Petition For Determination of Just And Reasonable Compensation And For Interim Billing And Collection Arrangements." That petition asks this Commission to determine the compensation that NW Iowa

should pay to NW Bell for NW Bell's participation in the origination or termination of an interstate telecommunications service offered by MCI.

3. Although we have decided to defer action upon the second petition, we have considered all pleadings filed in connection with both petitions in order to determine the effect of various agreements that conceivably might be relevant in resolving the dispute between NW Bell and NW Iowa.

4. NW Bell and NW Iowa have entered into an "extended area" arrangement that permits local exchange service subscribers in NW Bell's Sioux City "exchange" and local exchange service subscribers in NW Iowa's Sergeant Bluff "exchange" to place calls to each other without paying toll charges. This arrangement may make the entire area an "exchange area" for purposes of the Communications Act. See Section 3(r), 47 U.S.C. § 153(r). NW Bell and NW Iowa have not, however, elected to pool revenues from the joint provision of exchange service. Those carriers have elected to use a bill and keep system to compensate each carrier for its participation in the extended area service. Each bills subscribers in its territory for exchange service and keeps the proceeds from its own exchange service billings. NW Bell does not compensate NW Iowa for terminating calls in Sergeant Bluff that originate in Sioux City and NW Iowa does not compensate NW Bell for terminating calls in Sioux City that originate in Sergeant Bluff.

5. MCI provides an interstate interexchange service known as Execunet that utilizes the facilities of local exchange telephone companies to originate or terminate calls. Such an origination and termination service is sometimes called access service because the interexchange carrier uses the facilities of the exchange carrier to access telephones in the exchange area.[1] MCI has obtained access to the Sioux City-Sergeant Bluff extended area through connections between MCI interexchange switches and NW Iowa's local exchange switch. MCI has been compensating NW Iowa for access service pursuant to an agreement between those companies. NW Bell claims that NW Iowa is obligated to share those access service revenues with NW Bell and has asked this Commission to prescribe an appropriate division of those revenues.

6. NW Iowa contends that NW Bell is not entitled to share in the access revenues that it receives from MCI because the extended area agreement is applicable to the use of NW Bell facilities for Execunet service. NW Iowa apparently interprets that agreement to mean that it is not obligated to compensate NW Bell for any traffic originating or terminating in the

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[1] The term "local distribution" has also been used to describe that service. This Commission ordered all exchange carriers to provide "local distribution" for new interexchange carriers in *Specialized Common Carrier Services*, 29 FCC 2d 870, 940, *affirmed sub nom. Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*. 423 U.S. 836 (1975).

Sioux City "exchange" that is routed through NW Iowa's Sergeant Bluff switch. AT&T contends that the extended area agreement is not applicable to Execunet access.

7. The express provisions of the extended area agreement are not applicable to the division of revenues from any service other than calls between the Sioux City and Sergeant Bluff exchanges. One would assume from the face of the agreement that any division of revenues for the origination of calls that terminate outside the extended area or the termination of calls that originate outside the extended area is covered by other agreements.

8. NW Iowa claims, however, that the extended area agreement is applicable to Execunet because that agreement has always been interpreted as being applicable to Foreign Exchange Service ("FX"). FX is an interexchange service that has always been treated for ratemaking and other purposes as though the customer had subscribed to two distinct services—a "private line" interexchange service from the subscriber's terminal to a local switch in another exchange and local exchange service in the "foreign" exchange. The customer is billed separately for these two services and normally pays the B–1 business exchange service rate as compensation for the access service in the "foreign" exchange. If the "foreign" exchange is part of an extended area the customer obtains access to all telephones in the extended area by paying the B–1 rate.

9. NW Iowa and NW Bell have treated such access revenues for this special type of exchange service in the same manner as local exchange service revenues. If the "private line" terminates in a NW Bell Sioux City switch NW Bell retains all the revenues from the B–1 billing.

10. NW Bell contends that the extended area agreement does not apply to the bill and keep arrangement for FX access service revenues because FX settlements are governed by a separate contract relating to FX service. NW Bell has submitted a copy of that contract as part of the record in this proceeding.

11. Our examination of that contract indicates that the contract merely describes procedures for dividing revenues for the "private line" portion of the FX service. If NW Iowa provided a subscriber loop at the subscriber's end, that agreement would determine the portion of the private line revenues NW Iowa would receive, but that agreement does not describe any arrangement with respect to the B–1 access service revenues at the "foreign exchange" or "open" end.

12. Neither the FX agreement nor the extended area agreement literally covers the FX open end access service. The division or non-division of the FX open end access revenues reflects an implicit agreement based on

long-standing industry custom that has apparently not been expressed in any formal contract between NW Bell and NW Iowa.[2]

13. Whatever implicit agreement has been reached would not appear to be applicable to the division of Execunet access service revenues. NW Bell and NW Iowa did not have any customary method for the division of Execunet access revenues before this dispute arose. That service did not exist in that particular area before MCI established connections with the NW Iowa switch.

14. NW Iowa also claims that NW Bell is not entitled to share in Execunet access service revenues because NW Bell does not share access service revenues for "call forwarding situations." This record does not provide us with sufficient information to determine whether NW Bell has any obligation to share those revenues. The resolution of that question would not appear to have any relevance to the question that has been presented in the NW Bell petition.

15. The practices that NW Bell and NW Iowa have followed in allocating access service revenues for other interexcharge services indicates that there is no explicit or implicit understanding that access service compensation for different interexchange services will be computed in a consistent manner. On the contrary, inconsistency is the norm in telephone company settlements. This Commission has decided to establish a system of access charges in large part because the inconsistent methods of computing access service compensation that have been developed by the industry produce results that are not fully consistent with the objectives and requirements of the Communications Act. See, *e.g.*, *MTS-WATS Market Structure Inquiry* (Second Supplemental Notice), 77 FCC 2d 224 (1980); (Fourth Supplemental Notice), 90 FCC 2d 135 (1982). In these circumstances, one cannot infer any implicit agreement for the division of Execunet access service revenues from the practices NW Bell and NW Iowa have followed in the past with respect to access service revenues for other services.

16. Although there is no explicit or implicit agreement between NW Bell and NW Iowa with respect to the division of extended area Execunet access revenues, AT&T, NW Bell's parent, has entered into agreements on that subject with independent telephone company organizations. In 1978 this Commission sponsored negotiations between AT&T and carriers that provide Execunet and similar services for the purpose of developing an interim formula for the computation of access charges for Execunet-type services. Carriers that offer Execunet-type services are

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[2] The customary divisions arrangement for FX open end access has not been prescribed or established by this Commission and we have not determined whether the present arrangement is desirable or fair. Future Commission actions in the access charge proceeding (CC Docket 78–72) and the exchange plant separations proceeding (CC Docket 80–286) may produce very different arrangements for the computation, collection and division of such access compensation.

sometimes called OCCs (Other Common Carriers). When AT&T reached a tentative agreement with the OCCs, several independent telephone company organizations protested because the agreement did not specify the compensation an independent telephone company would receive when Execunet-type access is provided in an extended area. Those organizations apparently feared that AT&T would follow the customary practice for FX open end access service and decline to compensate an independent if access to an extended area was provided through a Bell switch.

17. Those protests led to further negotiations. The tentative agreement was expanded to include a requirement that independent telephone companies in an extended area be compensated and the formula for computation of access charges was revised to include a factor to reimburse AT&T for amounts that would be paid to independents for extended area access. Paragraph 16(c) of that agreement also said: "In cases where the independent telephone company (or any other telephone company in the system of which it is member) has negotiated a basis for settlement with an OCC for ENFIA terminating in its territory, Bell will settle on that same basis with that independent company for the B–I [Bell-Independent] Execunet/Sprint type traffic involved in that EAS area." The final "ENFIA" agreement was signed by representatives of AT&T, GTE, three OCCs and three independent telephone company organizations—United States Independent Telephone Association, National Telephone Cooperative Association, and Organization for the Protection and Advancement of Small Telephone Companies.

18. If MCI had provided Execunet service to the extended area through a connection with NW Bell's Sioux City switch, NW Bell would be obligated to compensate NW Iowa in accordance with the ENFIA agreement. NW Bell could not rely upon the extended area agreement or customary practices with respect to FX open end access service to avoid the contractual commitment that its parent gave to the independent telephone company organizations.

19. Inasmuch as the independent telephone company organizations did not purport to have the authority to bind their members, NW Iowa might be viewed as a third party beneficiary of the contract. It might not have a contractual obligation to compensate NW Bell for extended area access through a NW Iowa switch in accordance with the formula NW Bell would be obliged to follow if such access were provided through a NW Bell switch.

20. At this time we need not decide the effect on this dispute of the ENFIA agreement and any related Commission action. Instead, we will defer action upon the request to impose a compensation arrangement and will provide the parties with the opportunity to reach an agreement regarding appropriate compensation. Our analysis of the various agree-

ments should provide sufficient guidance to NW Bell and NW Iowa to enable them to negotiate an appropriate compensation arrangement.

21. If NW Bell and NW Iowa do not reach any agreement within 60 days after the release of this opinion, we will proceed to determine the remaining questions. If NW Bell and NW Iowa do reach an agreement within that period, the second NW Bell petition will be dismissed.

22. Accordingly, IT IS HEREBY ORDERED, That the aforesaid Petition for Declaratory Ruling of NW Bell IS GRANTED to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico Secretary

Domestic Public Land Mobile Radio Service
Frequency Allocation
One-Way Communications
Paging Service

Petitions for reconsideration of *First Report and Order* in Docket No. 80–183, 89 FCC 2d 1337, 47 F.R. 24557, granted to an extent and otherwise denied. Need showing requirements returned for incumbent carriers in a market, and a fixed forty-mile separation criterion adopted. Requirements of 47 C.F.R. Sections 22.15(j)(8) and 22.115 are waived.

—*One-Way Paging Stations*
GEN. Docket No. 80–183

FCC 82–503

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON D.C. 20554

In the Matter of	
Amendments of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928–941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-way Paging Stations in the Domestic Public Land Mobile Radio Service	General Docket No. 80–183 RM–2365 RM–2750 RM–3047 RM–3068

MEMORANDUM OPINION AND ORDER
ON RECONSIDERATION (PART 1)

Adopted November 16, 1982; Released November 16, 1982

BY THE COMMISSION: COMMISSIONER JONES ABSENT.

I. Preliminary Statement

1. We have before us informal comments and four petitions for reconsideration[1] of our *First Report and Order* (the *Order*) in General Docket

[1] Petitions were filed by Telocator Network of America (Telocator); Mobile Communications Corporation of America (MCCA); Page America Communications, Inc. (Page America); and Beep-Beep Page, Inc. (Beep-Beep Page). Informal comments were filed by American Telephone and Telegraph Company (AT&T) and United Telephone System, Inc. (UTS).

80–183[2], allocating 3 MHz of spectrum[3] for private and common carrier one-way paging systems.[4]The petitions identify four substantive issues: the necessity for need showings by existing carriers for initial 900 MHz frequencies; definition of a market; network paging policies and procedures; and federal preemption of state entrance, exit and rate regulations for the network paging frequencies.[5]

2. The first two issues pertain to non-network paging, while the second two relate exclusively to network paging.[6] Our review of the petitions reveals that the non-network issues can be handled fairly easily, but the network issues will take more time to resolve. Rather than delay action on the non-network issues, we have decided to treat them separately. Therefore, this Order will resolve only the non-network issues, and applications for those frequencies will be accepted on December 1, 1982, as established in our August 5, 1982, *Memorandum Opinion and Order*, 47 Fed. Reg. 35203 (August 13, 1982). While we anticipate expeditious resolution of the network paging issues, it is unlikely that Commission approval and public release can be accomplished before the December 1, filing date. Therefore, we will defer the date for accepting network applications until 30 days after the Order addressing those issues is published in the Federal Register.

3. As discussed below, we have decided to retain the need showing requirements for existing carriers, but we will adopt a forty mile separation criterion for purposes of determining whether an applicant is entitled to an initial or subsequent one-way paging frequency in a market without demonstrating need. On our own motion, we will eliminate the submission of certain engineering data with respect to 900 MHz applications.

II. Discussion

A. Need for Service

4. We had traditionally required common carrier applicants for one-way paging frequencies to demonstrate a public need for service.[7] In our

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[2] 89 FCC 2d 1337, 47 Fed. Reg. 24557 (1982).

[3] One MHz (forty 25 KHz frequencies) was allocated for private radio systems, one MHz was put in reserve for advanced technology paging systems and one MHz was allocated for common carrier paging systems.

[4] This order pertains exclusively to the common carrier frequencies, 931.0125–931.9875 MHz. The Commission dealt with the private radio frequenices in its *Second Report and Order*, 47 Fed. Reg. 39502 (September 8, 1982).

[5] Telocator also requested deferal of the initial filing date for 900 MHz applications. On August 5, 1982, the filing date was extended from September 7, to December 1, 1982, *Memorandum Opinion and Order*, 47 Fed. Reg. 35203 (August 13, 1982), therefore this issue is moot.

[6] Three of the forty 900 MHz paging channels allocated to the Common Carrier Bureau were designated exclusively for inter-city, "network" (regional and nationwide) paging. The remaining thirty seven channels will be utilized for local or "non-network" paging.

[7] The need standards which have been applied to applications for an initial frequency evolved primarily out of two cases, Long Island Paging, 30 FCC 2d 405 (1971), and New York Telephone Co., 47 FCC 2d 488, *recon. denied*, 49 FCC 2d 264 (1974) *aff'd sub nom.* Pocket Phone Broadcast Service, Inc. v. FCC, 538 F. 2d 447 (D.C. Cir. 1976). Past Commission practice had been to require applicants for an initial frequency to submit a public need survey, with demographic and commercial information being accepted to supplement the need survey.

First Report and Order, we eliminated the submission of need showings by applicants for initial paging frequencies in a market. This policy applies to all paging frequencies, not only frequencies in the 900 MHz band. However, to safeguard against inefficient use of the spectrum, we proposed to authorize no more than a single paging frequency at a time. We took this action in light of the clear public need for additional one-way paging services and the determination that the preparation and submission of initial public need showings were time consuming, administratively burdensome and unnecessary to further the public interest.[8] We concluded that a general policy in favor of new entry in the one-way paging industry would best serve the public interest, convenience and necessity.

5. However, we decided to retain need demonstrations for incumbent paging licensees who apply for a new or additional frequency in a market. Therefore, pursuant to Section 22.516 of our Rules, after authorization for one paging frequency in a market is obtained, a licensee may apply for an additional frequency in that market only if it supplies a traffic load study which demonstrates that the existing paging facility is insufficient to meet increased demand.

6. We rejected commenters' arguments that existing carriers should have the same opportunity to enter the 900 MHz market as new carriers. We concluded that allowing an existing carrier a 900 MHz frequency without demonstrating need would result in inefficient use of the new frequencies and would frustrate our policy encouraging new carriers in the market and creating a wide range of user choices.

7. In its petition, Telocator argues and AT&T agrees that all applicants, both new and existing carriers in a market, should be permitted to apply for an initial 900 MHz paging channel without demonstrating need. Telocator contends that our discussion of warehousing in the *First Report and Order,* which justifies elimination of need showings for new entrants in a market, is an equally compelling argument to support eliminating need for all applicants. It refers to the following statements in the *First Report and Order* to support its claim that allowing existing carriers in a market an initial 900 MHz channel without demonstrating need will not encourage warehousing or inefficient use of the frequencies: "warehousing is linked to availability of frequencies; we do not believe that entrepreneurs would undertake application and construction costs absent need; and we are unaware of any warehousing to date," 89 FCC 2d 1337, 1351 and 1352 (1982).

8. Telocator further contends that the allocation at 900 MHz was originally sought to enable the RCC industry, for the first time, to provide

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[8] It was determined that public need showings for one initial frequency often provoked petitions to deny that delayed service while amendments to the applications invariably cured any deficiencies raised in the petitions.

high quality tone-voice service on a significant scale. It argues that to preclude existing carriers from providing tone-voice service, or to force them to demonstrate loading on a channel which provides different services, is both illogical and inconsistent with Commission policy encouraging competition and diversification of service offerings.

9. Moreover, Telocator argues that to the extent our decision regarding need rests on the assumption that the 900 MHz band is fungible with other paging frequencies or that all types of service offerings can be readily intermixed on a single paging network, these assumptions are false. Telocator states that it is more difficult to achieve adequate stability for simulcasting at 900 MHz than at 35 or 43 MHz (the low band),[9] that noise at 900 Mhz is less, and the cost of a 900 MHz base station transmitter is three times the cost of its counterpart at lowband. Moreover, Telocator claims that networks employing simulcasting often use a digital equalization technology which does not pass audio signals. Therefore, to require licensees to intermix services on the same network would be forcing carriers "into a competitive mold, whereby no carrier has the option of differentiating its offerings on the basis of cost, quality of service or technical innovation."

10. Finally, Telocator argues that the *First Report and Order's* theory of competition—encouraging additional carriers in the paging market to create a wide range of user choices—is both narrow and in error. It asserts that since the paging market is already characterized by intensive competition, our focus on encouraging new entrants in the paging market is misplaced. It claims that our focus should be on whether the licensing policies are unnecessary or irrational obstacles to existing carriers in a market.

11. After carefully considering these arguments, we affirm our finding that it is in the public interest to require existing carriers in a market to demonstrate need for an additional paging frequency. There are simply not enough frequencies available for all carriers interested in providing one-way paging service to allow existing carriers another frequency without demonstrating need. Moreover, implicit in our decision to retain need showings for additional channels is the finding that there is more incentive to warehouse additional frequencies than initial frequencies. Therefore, our reasons for eliminating need showings for initial channels are not equally applicable here. We emphasize that existing carriers are not being denied entry into the 900 MHz market, they are merely being required to demonstrate need for an additional frequency.

12. We reject Telocator's argument that the technical and commercial characteristics of the 900 MHz band render it incompatible with other paging frequency service offerings. As a practical matter, it is technically

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[9] Simulcasting is the transmission of information from two or more base stations simultaneously.

feasible for a carrier to intermix tone-voice and tone-alert service or to employ simulcasting for voice paging.[10] It might be more expensive to intermix services on a single frequency; however, it is not technically impossible to do so, as Telocator suggests. Further, although Telocator argues that only the 900 MHz band is suitable for high quality tone-voice service, incumbent carriers have for years had access to UHF and VHF channels which can support high quality tone-voice service.

13. We also reject Telocator's arguments regarding its theory of competition. In light of the historic scarcity of paging frequencies, we believe that competition would not be fostered by allowing existing carriers to obtain another frequency in a market without demonstrating need. Although our recent allocations in this proceeding and in CC Docket 80–189 (lowband channels) have alleviated the historic shortage to some extent, the availability of paging frequencies remains a valid concern. Requiring need demonstrations is a rational and practical method of encouraging competition, spectrum efficiency and technological and service innovation.

B. Definition of a market

14. In conjunction with its need argument, Telocator urges us to redefine a market for purposes of determining whether an applicant is requesting a new or additional frequency in an area. As explained above, an existing carrier must demonstrate need, *i.e.*, that its existing facility is insufficient to meet increased demand, in order to obtain an additional frequency in a market.

15. Traditionally, we have used the "fifty percent overlap" rule to determine whether an applicant is requesting a new or additional frequency in an area. If the reliable service contours or 43 dBu contours of two transmitters licensed to or applied for by the same carrier overlap by fifty percent or more, both transmitters are deemed to be serving the same market. Therefore, the channel requested is treated as an additional rather than a new channel and it must be supported by a need demonstration. Conversely, if the reliable service areas do not overlap or overlap by less than fifty percent, they are deemed to be serving different markets and a need demonstration for the new frequency would not be required.

16. As stated above, the reliable service area for one-way paging stations is generally considered to be its 43 dBu contour. However, in our *First Report and Order*, we adopted a fixed twenty mile radius to define

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[10] Paging equipment is currently available which permits tone-alert and tone-voice services on the same frequency using simulcast. There are presently wide area paging systems which provide this dual service. Although some networks use digital equalization technology which does not pass audio signals, these base stations can be retrofitted to include audio signals or replaced by a base station which passes both audio and digital signals.

the reliable service area of a 900 MHz paging station. We concluded that twenty miles was a realistic, reliable standard because it is the approximate distance that a paging signal travels from a transmitter site. Consequently, for purposes of determining need, the fifty percent overlap rule would apply to a fixed twenty mile service contour as opposed to the traditional 43 dBu contour.

17. However, in its petition, Telocator requests that for purposes of determining an applicant's initial channel assignment, we define market in terms of a Standard Metropolitan Statistical Area (SMSA). Telocator states further, that after the initial channel is loaded in accordance with Section 22.516, our analysis should revert to the fifty percent overlap rule. Telocator's concern is that under the present 900 MHz rules, by judicious spacing of transmitter sites at approximately 20-mile intervals, the same applicant can obtain a minimum of three different channels to serve the same market without having a fifty percent overlap among the respective service areas. It claims that the adoption of an SMSA market concept would essentially eliminate abuse of the fifty percent overlap rule.

18. We recognize the potential for an applicant to lock up several 900 MHz frequencies in a market, notwithstanding the fifty percent overlap rule. We agree with Telocator that an alternative to the fifty percent overlap rule should be adopted. However, instead of defining a market as Telocator suggests, we will eliminate the fifty percent overlap rule with respect to 900 MHz paging systems and adopt a fixed forty mile separation criterion for purposes of determining whether a traffic load study must be submitted to obtain an initial or subsequent 900 MHz paging frequency in an area.[11] We have adopted a forty mile separation criterion because the reliable service area contour of a base station is twenty miles. Consequently, if we require base stations to be distanced by forty miles there will not be any overlap between the twenty mile reliable service area contours of these stations. Therefore, if an applicant for a paging frequency attempts to distance its proposed base station less than forty miles from a previously licensed base station, the applicant must demonstrate need for the additional channel pursuant to Section 22.516 of the Rules. In addition, this fixed mileage requirement will also apply if a 900 MHz licensee wishes to obtain a new or additional paging system on another paging frequency at 35, 43, or 150 MHz.

19. We find that adoption of a forty mile separaton criterion for purposes of determining whether an applicant is requesting a new or additional

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[11] This policy should not be confused with the fixed 70 mile separation criterion adopted for frequency reuse purposes. To prevent interference, we will not license different applicants on the same frequency unless base stations are separated by 70 miles. The separation criterion discussed above, pertains to the same applicant who wants a new frequency in a market.

frequency in an area, will best serve the public interest. This appears to be a more effective way to eliminate the possibility of an applicant acquiring several 900 MHz frequencies in an area than Telocator's proposal. Further, it is more easily administered than an SMSA standard. We believe that a fixed separation criterion is consistent with the Commission's desire to promote competition among carriers and ensure spectrum efficiency. Moreover, it will eliminate the economic burden to the applicant and the administrative workload to the Commission associated with preparing and analyzing engineering contour studies. Finally, the public will benefit by the Commission's expeditious authorization of service.

C. Technical Matters

20. We have decided to waive the requirements that certain engineering data be submitted with 900 MHz applications. Our *First Report and Order* adopted a 20 mile reliable service area definition and a fixed 70 mile separation criterion to determine frequency reuse instead of relying on interference studies. Therefore, the topographic maps presently required by Section 22.15 (j)(8) and the profile graphs required by Section 22.115 of the Rules need not be submitted with 900 MHz paging applications. However, should the Commission need these maps and graphs in the future, the applicant will be responsible for providing them at that time. Moreover, the maps required to be submitted with the application should be U.S. Geological Survey maps with a scale of 1:250,000 (full scale reductions are not permitted) depicting each base station site and its respective service area contour. The map must also indicate latitude and longitude. These maps are necessary to provide us with a perspective of the applicant's system design and will enable us visually to determine if there is overlap between service area contours. Notice and comment are not required prior to waiver of this rule because it relates to Commission procedure and practice. 5 U.S.C. §§ 553(b). Because this rule is procedural, not substantive, the effective date provisions of the Administrative Procedures Act, 5 U.S.C. § 553(d), do not apply here.

D. Other Matters

21. Finally, we will reemphasize several policies which were adopted in the *First Report and Order.* First, the decision to authorize one frequency at a time applies to all paging bands, not only 900 MHz frequencies. 89 FCC 2d 1349, 1350. Therefore, this limit is applicable to all paging applications that have been filed and to all paging frequencies which will be filed after the adoption of this Order. Further, if an applicant files for a one-way paging frequency when it has another paging application pending in that market, *irrespective of the frequency band,* the Commission will treat the previously filed paging application as being amended by the subsequent application. *Id.* at 1363–1364. The amended application will

then be considered newly filed and subject to applicable cut-off procedures. 47 C.F.R. § 22.23(c)(i); § 22.31. Finally, Section 22.13, pertaining to disclosure of the real party or parties in interest, was revised in the *First Report and Order.* We emphasize that this rule applies to all common carriers engaging in Domestic Public Land Mobile Radio Services. Thus, it is applicable to applicants for two-way mobile services as well as one-way paging services. *Id.* at 1353, n.29, and 1366.

III. Conclusion

22. After careful consideration of the issues pertaining to non-network paging, we have decided to retain need showing requirements for incumbent carriers in a market, and to adopt a fixed forty mile separation criterion to determine whether an applicant is requesting a new or additional channel in an area.

23. We have attempted to streamline and simplify the regulatory procedures for 900 MHz applications. This is evidenced by the elimination of engineering contour studies for the definition of a market, reliable service area and frequency re-use calculations and the elimination of public need showings for all initial paging channels. We believe that the procedures adopted herein, represent the most efficient and expeditious way to render 900 MHz non-network paging services to the public.

IV. Ordering Clauses

24. Accordingly, IT IS ORDERED, That the petitions for reconsideration are granted to the extent set forth herein, and are otherwise denied.

25. IT IS FURTHER ORDERED, That pursuant to the authority found in Section 154(i), 301 and 303(r) of the Communications Act of 1934, as amended, Part 22 of the Commission's Act of regulations ARE AMENDED as specified in Apendix A. These amendments shall become EFFECTIVE 30 days after publication of this *Memorandum Opinion and Order* in the Federal Register.

26. IT IS FURTHER ORDERED, That the topographic maps required by 47 C.F.R. Section 22.15(j)(8) and the profile graphs required by 47 C.F.R. Section 22.115 are hereby waived for a one-way paging applicant requesting a 900 MHz one-way paging frequency.

27. IT IS FURTHER ORDERED, That applications for 900 MHz network paging frequencies will be accepted thirty days after the Order resolving those issues is published in the Federal Register.

28. IT IS FURTHER ORDERED, That applications for 900 MHz non-network paging frequencies will be accepted on December 1, 1982, for an initial period of 60 days only.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

Appendix A

47 CFR Part 2 is revised as follows:

1. 47 C.F.R. § 22.516 is amended by revising the heading and the introductory language as follows:

§ 22.516 Additional showing required with application for assignment of additional frequency or frequencies, or as otherwise required by the Commission's Rules.

Traffic load studies shall be required: (1) with an application requesting the assignment of an additional frequency for an existing one-way signaling station; (2) with an application requesting the assignment of one or more additional frequencies for an existing two-way station; or (3) as the Commission may otherwise prescribe. A traffic load study shall include a showing of the following:

2. Part 22 is amended by adding new Section 22.525 to read as follows:

§ 22.525 One-way signaling stations.

(a) An applicant for a new one-way signaling station may request no more than one channel. No showing of public need will be required of an applicant for an initial channel regardless of the band for which the request is made.

(b) An applicant requesting a new 900 MHz one-way signaling station will be deemed to be requesting additional frequencies for its existing station if there is less than forty miles distance between the applicant's existing base station and its proposed base station. An existing 900 MHz licensee requesting a one-way frequency will be deemed to be requesting an additional frequency if its proposed base station is less than forty miles from its existing 900 Mhz base station.

(c) An applicant for an additional transmitter location within the service area of its existing station, and on the same frequency, will not be required to demonstrate public need for the new facility. The applicant may not reduce the distance between its own station location(s) and a co-channel station below that specified in § 22.503(c) as a result of the addition of a new transmitter location unless the frequency is time-shared to avoid interference.

(d) An applicant for an additional channel must demonstrate the need for it by submitting a traffic load study pursuant to § 22.516.

(e) An applicant filing an application for a 900 MHz paging frequency at a location within forty miles of a pending one-way application, without dismissing the previously filed pending application, will be treated as amending the previous application. The amended application will be considered newly filed and subject to the applicable cut-off procedures. A pending 900 MHz application will be amended by a subsequent application for any one-way paging frequency, if the base station location is within forty miles of the location requested in the pending 900 MHz application.

(f) In the cases where the pending or newly filed applications do not involve the 900 MHz band, an applicant requesting a new one-way signaling station will be deemed

to be requesting additional frequencies for its existing station if either (1) the transmitter location specified in the new application is within the service area of the existing station, or (2) there is an overlap of 50 percent or more between the service areas of the existing and proposed facilities.

Common Carrier, Interconnection
Common Carrier, International
Competition, Common Carriers
TAT–4

Commission revisited 1964 TAT–4 decision which established service restrictions on carriers' international offerings. Commission concluded that changed circumstances and evolving technology require the elimination of the voice/record dichotomy in the provision of international service by AT&T and the IRCs.
Overseas Communications
CC Docket No. 80–632

FCC 82–547

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
OVERSEAS COMMUNICATIONS SERVICES	CC Docket No. 80–632

REPORT AND ORDER

Adopted: December 8, 1982; Released: December 22, 1982

BY THE COMMISSION: COMMISSIONER FOGARTY CONCURRING AND ISSUING A STATEMENT IN WHICH COMMISSIONER QUELLO JOINS.

I. BACKGROUND

1. On October 28, 1980, we released a Notice of Proposed Rulemaking (NPRM) soliciting comments on whether the regulatory limitations on the provision of international non-voice services on a primary basis by the American Telephone and Telegraph Company (AT&T) should be removed.[1] The NPRM also requested comments on the merits of authoriz-

[1] Overseas Communications Services, 84 FCC 2d 622 (1980).

ing the international record carriers (IRCs) to provide international voice services on a primary basis.[2]

2. AT&T currently provides international voice services such as international message toll service (IMTS) and private line voice service.[3] The IRCs currently offer a variety of international record services including telegram, telex, private line, alternate voice-data (AVD), facsimile and high speed data.[4]

3. The voice/record dichotomy in international service offerings evolved from the historical differences in international voice and record technologies and the provision of these services by different carriers over separate networks. With respect to the prohibition on AT&T's provision of international record services, the general policy was codified in our 1964 TAT–4 decision.[5] In *TAT–4* we preserved the developing alternate voice-data market for the IRCs at a time when technology (submarine cables) made separate networks and service providers for international voice and record transmissions unnecessary. This protectionist decision insulated the IRCs from competition with AT&T and assisted them in making the transition from an older and less desirable technology (radio) to a newer and more desirable technology (cable).[6] The origin of any Commission imposition of a prohibition on IRC provision of international voice services is less clear. It appears to be loosely rooted in the Commission's radio-telegraph rules (Part 6) and decisions that the Commission made on a case-by-case basis involving Hawaii-Mainland, Caribbean and trans-Atlantic high frequency (HF) radio and cable system applications. In these cases references are made to a general policy direction and then a waiver is granted or an exception made. In a more recent decision the Commission indicated that AT&T is "restricted" to voice services while the IRCs "primarily provide" record services.[7]

4. In our NPRM we raised both policy issues. There we traced the history of the international voice/record dichotomy, cited cases concerning IRC and AT&T service offerings, analyzed the *TAT–4* decision, and discussed the current international market structure. We noted the existing high rates of return on international services, the evolving technology and, consistent with our numerous procompetitive policy deci-

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[2] The major IRCs are: ITT World Communications Inc. (ITT), RCA Global Communications, Inc. (RCA), Western Union International, Inc. (WUI), TRT Telecommunications Corporation (TRT), and FTC Communications, Inc. (FTC). We note that several small carriers, and most recently Western Union, have also been authorized to provide international record services.

[3] AT&T also provides international Dataphone service over its IMTS facilities on a secondary basis.

[4] The IRCs also provide international voice service over their Datel facilities on a secondary basis.

[5] AT&T, 37 FCC 1151 (1964)

[6] The development of the indefeasible right of user (IRU) concept in 1964 and the 1966 Authorized Users decision also aided the IRCs during this transitional period. *See* Mackay Radio and Telegraph Company, Inc., FCC 64–41 (adopted January 22, 1964) and Authorized Users, 4 FCC 2d 421 (1966).

[7] Datel, 76 FCC 2d at 179 (1980).

sions, tentatively concluded that removing regulatory constraints on AT&T and IRC service offerings would be in the public interest. We indicated our belief that unrestrained operations by these carriers would improve service, enhance efficiency and potentially lead to lower rates for users.

5. Comments on our tentative conclusions were filed by AT&T, ITT, RCA, WUI, TRT, Satellite Business Systems (SBS), the American Petroleum Institute (API), Aeronautical Radio, Inc. (ARINC), and the National Telecommunications and Information Agency (NTIA). As part of their comments, the IRCs jointly submitted a consultant's study on the effects of AT&T entry into the international record market. Additionally, NTIA presented a two volume analysis of fifteen recent Commission actions relating to international issues and their combined effect on users, carriers and market structure.[8] Replies were filed by AT&T, ITT, RCA, WUI, TRT, FTC and the Department of Defense (DoD).

6. Below we outline the pleadings of the parties, analyze the submissions, affirm our tentative conclusion that the public interest would be best served by removing the barriers to full market entry by both AT&T and the IRCs.

II. THE PLEADINGS

7. The focus of the submitted pleadings is our tentative conclusion that AT&T be permitted to provide international record services on a primary basis. This order therefore gives particular attention to the issue of AT&T's full market entry.

A. IRC Comments

8. The IRCs argue that competition between themselves and AT&T in the provision of international record services is not reasonably feasible and will jeopardize their ability to retain a meaningful share of the international market. Pointing to AT&T's vast nationwide domestic network, large sales force, financial resources and control of bottleneck facilities, the IRCS contend that AT&T will monopolize and dominate the entire international market if it is authorized to provide international record services. The IRCs conclude that AT&T's provision of international record services will stifle rather than promote competition, will increase rather than decrease market concentration, and will ultimately not be in the public interest. The IRCs therefore request that we retain

[8] The IRC sponsored study was prepared by Dr. Walter G. Bolter and is titled International Communications Industry Policy: A Study of Competition, New Entry, and the TAT–4 "Voice-Record Dichotomy." The two volume study presented by NTIA was prepared by MarTech strategies, Inc. and is titled Competition and Deregulation in International Telecommunications: An Analysis of Fifteen FCC Actions and Their Combined Effects.

the *TAT–4* prohibition on AT&T provision of international record services.

9. The IRCs agree, however, with our tentative conclusion that they should be authorized to provide international voice services. Stating that they have neither control of bottleneck facilities nor market power, the IRCs indicate that additional competition in the international voice arena would be consistent with our procompetitive philosophy and past decisions. Additionally, the IRCs aver that such expanded service would benefit users by creating a choice of carriers and offering the prospect of new services and substantially lower rates. To this end the IRCs have filed applications to provide private line voice-only service between the U.S. and the U.K.[9] In seeking authority to provide voice services the IRCs particularly reject the concept that full market entry by both AT&T and the IRCs is symmetrical or represents a *quid pro quo*.

10. Specifically, as to AT&T provision of international record services, the IRCs contend that: (1) AT&T's relative market position in the telecommunications market *vis a vis* the IRCs has not materially changed since the 1964 *TAT–4* decision; (2) exclusion of AT&T from the international record market would not adversely effect AT&T; (3) AT&T entry would seriously jeopardize the ability of the IRCs to provide essential services; (4) AT&T entry could result in disadvantageous operating agreements being imposed on all carriers other than AT&T by foreign correspondents; and (5) AT&T will not compete fairly with the IRCs. The IRCs further state that the existing international record market is competitive and meets customer needs in a reliable and innovative manner. These contentions are more fully described below.

11. In support of their argument that AT&T entry into the international record arena on a primary basis should not be permitted, the IRCs emphasize that the relative market position of AT&T and the IRCs which

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[9] File Nos. I–T–C–82–087 (FTC), I–T–C–82–109 (WUI), I–T–C–82–139 (ITT), I–T–C–82–151 (RCA) and I–T–C–82–232 (TRT). These applications request authority to lease satellite facilities from Comsat and provide voice-only private line (leased channel) service between the United States and the United Kingdom. All of these applications are now ripe for our consideration. The IRCs indicate in their applications that this service: (a) will be tariffed at a rate approximately 30% less than that presently charged by the IRCs for alternate voice-date circuits and nearly 50% less than that presently charged by AT&T for private line voice circuits; (b) will utilize new multiplexing techniques to increase facility efficiency; (c) will not ecnomically injure AT&T; and (d) has already been coordinated with the U.K. correspondent, British Telecommunications International. In response to submissions from AT&T recommending that no action be taken on these applications until Docket 80–632 is fully resolved, the IRCs emphasize that these authorizations will provide immediate benefits to users. The IRCs also argue that *TAT–4* does not apply to IRC voice offerings and, in the alternative, that a grant of these applications would not prejudge the *TAT–4* proceeding. We note that Comsat, which did not file comments in Docket No. 80–632, generally supports the IRCs' requests for voice-only authority. However, Comsat's support is not unequivocal. Comsat indicates that technical problems may arise regarding the proposed multiplexing equipment. Comsat therefore recommends that we authorize this new offering on a develoment basis. In a separate order we today grant these applications.

existed at the time of the Commission's 1964 *TAT–4* decision continues to exist today. The IRCs present a substantial amount of data to demonstrate that AT&T continues to be the overwhelmingly dominant telecommunications entity in this country in terms of revenues, market penetration, employees, plant, expenditures and percentage of Gross National Product. While recognizing, in the words of the NPRM, that they are now firmly established businesses with significant market shares, substantial rate bases, and impressive rates of return" (NPRM para. 16), the IRCs aver that such development has been negated by proportionate AT&T expansion. In short, the IRCs contend that the same factors which prompted the *TAT–4* decision continue to exist and warrant the preservation of the *TAT–4* policy. The IRCs therefore conclude that our *TAT–4* policy decision was farsighted, continues to be correct and should not be modified.

12. The IRCs argue that excluding AT&T from the international record market would have only a minimal impact on AT&T. They state that AT&T's revenues from overseas voice services are approximately 2% of its total revenues. Since international voice services account for approximately 67% of all (both voice and record) international revenues, the IRCs conclude that AT&T exclusion from the international record market would not adversely effect AT&T's future earnings.[10]

13. Concomitant with above position, the IRCs emphasize their dependence on revenues derived from international record services and state that AT&T entry into the international record arena would greatly effect their revenues. The IRCs argue that ATT&T entry would seriously jeopardize their viability and impair their ability to provide essential services. Pointing to our characterization in the *TAT–4* decision of international telegram service as an essential offering the provision of which should not be placed in risk, the IRCs contend that their telex service is now comparably essential. The IRCs concede that it is unlikely AT&T will offer a relatively low speed and mature service such as telex. While therefore not offering an exactly identical service to the IRCs' main source of revenue, the IRCs indicate that AT&T will no doubt provide an interchangeable or substitutable service. Such an offering by AT&T would, according to the IRCs, divert substantial revenues, severely impact their viability and eventually impair their ability to provide essential service to the public.[11] The IRCs argue that this result is contrary to the explicit competitive policy of the *TAT–4* decision.

14. The IRCs fear that a foreign administration's preference to deal with as few U.S. carriers as possible may result in the bulk of inbound

[10] Thus, even if AT&T captured one half of the international record market, its revenues from international services would only increase from 2% to 2.5% of its total revenues.

[11] The IRCs argue that AT&T's secondary international record service (Dataphone) already adversely impacts on their revenues.

record traffic being routed through AT&T. Additionally, the IRCs anticipate that foreign administrations may negotiate more favorable operating agreements with AT&T and perhaps whipsaw the IRCs.[12] Such actions, the IRCs argue, would negate any possible safeguards to assure fair competition that could be attached to AT&T's authorization to enter the international record arena. Moreover, the IRCs state that such actions by foreign carriers would be difficult to correct since our jurisdiction does not reach foreign shores.

15. The IRCs do not believe that fair competition with AT&T in the provision of international record services is possible. They emphasize that AT&T controls facilities which are essential to their record offerings. These essential facilities include local loops, most access lines (interoffice links and terrestrial extensions) and submarine cables. The IRCs also cite cases in which AT&T's competitive tactics have been called into question.[13] The IRCs argue that AT&T's track record, i.e., alleged past anticompetitive actions in the areas of facility access, interconnection and pricing tactics, clearly indicates that it will employ its dominant position to engage in unfair and unlawful practices. They therefore recommend that we defer any final decision on AT&T entry until pending legislation is enacted and until the current antitrust proceeding is completed. The IRCs are skeptical that even the imposition of regulatory restraints and the threat of sanctions, ordinarily sufficient safeguards to anticompetitive practices, would be sufficient here. The IRCs generally reject the effectiveness of requiring a separate subsidiary, establishing a moratorium period, implementing closer rate base regulation, imposing service limitations, prescribing interconnection requirements and pursuing traditional antitrust remedies. They contend that only market exclusion will permit the international record market to remain competitive. Nevertheless, the IRCs argue that such restraints and checks must be imposed if we do decide to permit AT&T entry.

16. Finally, the IRCs contend that the present international record market is competitive and encourages innovation, provides efficient service and permits users to make carrier/offering decisions according to price and quality of service. The IRCs state that the international record market is the most competitive regulated telecommunications market in

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[12] Whipsawing is the term used to describe the ability of a foreign correspondent to utilize its monopoly power to play one U.S. international carrier against another to gain concessions and benefits. These concessions and benefits ordinarily would related to settlement and accounting rates.

[13] *See* Hush-a-Phone Corp. v. United States, 238 F. 2d 226 (D.C. Cir. 1956), Carterfone, 13 FCC 2d 420 (1968), *recon. denied* 14 FCC 2d 571 (1968), Bell System Tariff Offerings, 46 FCC 2d 413 (1974), *aff'd sub nom.* Bell Telephone Company of Pennsylvania v. FCC, 503 F. 2d 1250 (3rd Cr. 1974), *cert. denied*, 442 U.S. 1026 (1975). AT&T, 60 FCC 2d 939 (1976). MCI Telecommunications Corp. v. FCC, 561 F. 2d 365 (D.C. Cir. 1977) *cert. denied*, 434 U.S. 1040 (1978); 580 F. 2d 590 (D.C. Cir. 1978) *cert. denied*, 439 U.S. 980 (1978), MCI Communications Corp. v. AT&T, F. Supp (N.D. Ill. 1980).

the United States. They conclude that this market structure is exactly the type desired by the Commission and should not be altered. In short, the IRCs claim that there is no need to tinker with a market which is already competitive and serves the public interest.[14]

B. Major Users and SBS

17. Major users of international communications services submitted filings which support our tentative conclusions that the IRCs should be authorized to provide international voice services and AT&T should be authorized to provide international record services. DoD, the largest single user of leased international facilities, supports our tentative conclusions and states that "with the increasing use of digital technology, the voice/record dichotomy is increasingly artificial." DoD states that a continuation of the dichotomy will create unnecessary uncertainty as to whether a service is a voice or record offering and will adversely affect service availability and customer costs. API states that it would be in the public interest "to have available the greatest number of services offered by the greatest number of providers." API further characterizes the present dichotomy as creating for users "serious inconveniences and inefficiencies in the transmission of their overseas communications. API concludes by indicating that the IRCs and AT&T should be permitted to offer all international services and that the Commission should assure service compatibility and facilitate carrier interconnection.[15] ARINC, which serves members of the air transport industry, states that AT&T and the IRCs should be encouraged to expand their international services. ARINC views the existing bar as increasingly artificial and as inhibiting competition to the detriment of users. SBS, a carrier, also supports our tentative conclusions. It states that removal of the artificial distinction between voice and record services "will facilitate the development of innovative telecommunications networks offering international services, similar to those authorized within the United States."[16]

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[14] The IRCs note our authorizations of several new carriers. They also speculate as to the amendment of Section 222, Western Union's re-entry into the international record market, and Comsat's possible entry into the international record market as a result of the Authorized Users proceeding, events which have subsequently occurred. They also argue that AT&T entry would discourage the entry of any other carrier.

[15] API's pleading indicates that the Central Committee on Telecommunications of the American Petroleum Institute is composed of representatives of forty-five of the nation's leading petroleum and natural gas companies. The filing also states that API has nearly six hundred member companies and that its members are major users of international telecommunications facilities.

[16] SBS is a domestic satellite carrier jointly owned by Comsat, IBM and Aetna. SBS offers its customers a digital network within the United States integrating voice, data, video teleconferencing and high-speed document distribution services. While primarily a domestic satellite carrier, SBS has been authorized to provide international service between the United States and Canada as well as the United Kingdom. *See* 88 FCC 2d 195 (1981), 88 FCC 2d 258 (1981) and FCC 82–422 (released October 1, 1982).

C. NTIA

18. NTIA characterizes the existing voice/record dichotomy as an artificial bar to the operation of market forces and states that such a barrier may result in system suboptimization and forestall, delay or inhibit the fullest development of new technologies and services. While indicating its belief that the relative market position between AT&T and the IRCs has not significantly changed since 1964, NTIA emphasizes that the dichotomy is inconsistent with the evolution of Integrated Services Digital Networks (ISDNs) which make no distinction between voice and record transmissions. NTIA concludes by stating that the elimination of this dichotomy would serve the public interest. NTIA also concludes that the Commission should consider and address various other issues related to marketplace competition. One such issue identified by NTIA is interconnection terms and conditions.

D. AT&T Comments

19. AT&T supports our tentative conclusion that the *TAT–4* restriction on its service offerings should be set aside. It also raises no objection to the provision of international voice services by the IRCs. AT&T makes three major arguments. First, it states that full market entry by all carriers would be consistent with Commission decisions which have found that the public interest is best served by the introduction of competition into the provision of telecommunications services. AT&T argues that our current regulatory philosophy is based in large part on the premise that the statutory public interest standard can be met by allowing marketplace forces to control entry, exit and the extent of competition. Secondly, AT&T contends that the rationale for the *TAT–4* decision has been dissipated by the IRCs' new service offerings, domestic expansion, increased earnings, and substantial revenues. AT&T also references the size of the IRCs' parent corporations, the declining role of international telegram service and the substantial growth of the entire international record market. Finally, AT&T argues that technological advancements make the categorization of services as either voice or record impractical. AT&T states that the development of ISDNs evidences that the arbitrary distinction between voice and record offerings will create inefficiencies, curtail carrier and limit customer options. Moreover, AT&T indicates that foreign administrations are instituting digital networks which will interconnect with U.S. carriers and users. The effectiveness of U.S. carriers is therefore related, according to AT&T, to their ability to provide all services through an integrated digital network both here and overseas.

E. IRC Replies

20. In their reply filings the IRCs reiterate their position that the *TAT-4* rationale is still valid since AT&T continues to have the capacity

and resources to overwhelm the IRCs. The IRCs urge us to recognize, as they assert NTIA had done, that AT&T remains the dominant service provider and has the ability to exploit its telephone monopoly to substantially reduce competition in the international record market if it is permitted to enter that market. The IRCs conclude that only continued market exclusion will preserve the competitive nature of the international record market. The IRCs also question NTIA's basis for supporting our tentative conclusion that AT&T entry into the international record market will be in the public interest. (NTIA states that retention of the voice/record dichotomy in view of technical advancements and the development of ISDNs would create inefficiencies and hinder further technological progress). The IRCs state that new technology may not necessarily blur the voice/record dichotomy, that NTIA misunderstands the relationship between analog and digital systems, and that some efficiencies may reasonably be sacrificed to preserve the competitiveness of the international record market. On other issues the IRCs: (a) indicate that two provisions of Title III of the Communications Act, Sections 313 and 314 relating to antitrust laws and competitive markets, are applicable to this rulemaking; (b) suggest that a separate proceeding on international competition and new technologies be initiated and completed prior to any further action in this proceeding; and (c) aver that any AT&T entry must be accompanied by real restraints and safeguards to preserve the viability of the IRCs and to assure fair competition.

F. AT&T Reply

21. In its reply filing AT&T notes that its support for our tentative conclusions is shared by major users of international services, SBS and NTIA. In response to the issues raised by the IRCs, AT&T states that substantial changes have occurred in the telecommunications industry since 1964, that the changes proposed in the NPRM are in the public interest, that foreign administrations will not act to preclude effective competition, and that advancements in technology are inconsistent with retention of the artificial voice/dichotomy. AT&T also argues that its entry should not be conditioned upon the resolution of all interconnection issues and that requiring a separate subsidiary is unnecessary.

22. Specifically, AT&T states that: (a) the IRCs now provide established services, have experienced substantial revenues/earnings growth, and are no longer in need of protection; (b) the IRC study does not provide substantiation for the IRCs' claim of significant adverse impact; (c) retention of the *status quo* in the provision of international record services will perpetuate an oligopoly and deny real benefits to users; (d) competition between AT&T and the IRCs is reasonably feasible in the international market just as competition between AT&T and the OCCs, resellers and other entities, most of which are smaller than the IRCs, exists in the

domestic market; (e) foreign administrations will not refuse to operate with multiple carriers and many foreign administrations are adopting a more positive attitude toward the competitive offering of facilities and services; and (f) the voice/record dichotomy is inconsistent with technological advancements and the worldwide development of integrated digital networks. AT&T further states that its entry into the international record market should not be delayed until all interconnection issues relating to the IRCs' voice services are resolved. AT&T notes that interconnection negotiations regarding the IRCs' nonprimary voice service (Datel) are ongoing. AT&T also notes that Datel is a relatively small revenue earner for the IRCs. In response to the IRCs' anticompetitive concerns, AT&T indicates that the *Computer II* decision requires a separate subsidiary for enhanced services. AT&T argues that a basic/enhanced dichotomy has replaced the voice/record dichotomy and that the imposition of a further structural separation requirement would be unnecessary and inconsistent with the evolving regulatory scheme. Finally, AT&T suggests that the Commission continues to have jurisdiction to resolve any other problems which may arise. It therefore concludes that the Commission should affirm its tentative conclusions and set aside the *TAT-4* voice/record dichotomy.

III. Discussion

23. The Communications Act requires this Commission to promote "a rapid, efficient, Nation-wide and workd-wide wire and radio communication service with adequate facilities at reasonable charges . . . 47 U.S.C. § 151. This statutory direction does not require the continuation of policies which do not serve this end. Our analysis of the history of the voice/record dichotomy, the *TAT-4* decision, the past and future industry structure, and the filings in this proceeding lead us to conclude that AT&T should be permitted to provide international record services and that the IRCs should be authorized to provide international voice services.[17] This action is consistent with the Act, the *RCA* public interest standard,[18] our many recent procompetitive decisions, the desires of major users, and changed circumstances. We anticipate that eliminating restrictions on IRC and AT&T service offerings will promote new choices for consumers, enhance the efficient use of facilities, and create a downward pressure on rates in an area where charges have been historically high. Moreover, this decision is compatible with technological advancements and the develop-

[17] This order eliminates a policy which unnecessarily restricted the international service offering of carrier. New international service offerings by AT&T and the IRCs will be implemented through the filing of appropriate applications and/or tariffs, such as the filings already made by the IRCs for additional facilities to provide leased channel voice service to the United Kingdom. *See also* Dataphone, 75 FCC 2d 682 (1980) and Datel, 76 FCC 2d 166 (1980).

[18] *See* para. 26, *infra*.

ment of digital systems. We further believe that the Communications Act contains sufficient safeguards to assure fair competition.

24. In reaching our decision to unfetter the international operations of AT&T and the IRCs we have analyzed the dynamics of the international market. Below we discuss: (a) the Act; (b) the *RCA* standard; (c) the voice/record dichotomy; (d) our regulatory approach; (e) the structure of the international record market (changed circumstances, including technological developments); (f) the IRC study as it relates to Western Union and AT&T entry; (g) other concerns raised by the IRCs and public benefits; and (h) IRC voice service.

A. The Act

25. There is no dispute among the parties submitting pleadings that clarification of the existing policy relating to AT&T and IRC international service offerings may be made by the Commission in this rulemaking proceeding. Neither congressional action nor a separate inquiry, as suggested by the IRCs, on the feasibility of international competition is required. In this proceeding we are changing a policy that was established in 1964 under our broad public interest mandate. After a thorough analysis of this policy and the significant changes which have occurred in the telecommunications industry in the last eighteen years, we believe that the public interest will be best served by eliminating the voice/record dichotomy in the provision of international services.[19]

B. The RCA Standard

26. The standard governing additional competitive entry in a given market is set forth in *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953).[20] Under *RCA* the Commission must determine whether competition is reasonably feasible in those markets sought to be served and that added competition is in the public interest. Feasibility of competition ". . . depends on whether there is sufficient traffic to support the additional of another competing direct circuit and upon the effect of the opening of such circuit upon the applicant as well as all other carriers providing service to the public." *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960). In determining whether added competition is in the public interest, "the Commission is not required to make specific findings of tangible benefit. . . . but the Commission must at least war-

[19] *See* Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979) and Greater Boston Television Corporation v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[20] This standard has been modified by the Record Carrier Competition Act of 1981 (RCCA) for "record carriers" providing "record communications service." However, this statute does not specifically apply to the provision of record services by AT&T or to the provision of voice services by the IRCs. *See* P.L. 97-130, 95 Stat. 1687.

rant . . . that competition would serve some beneficial purpose such as maintaining good service and improving it." 346 U.S. at 96–7.

27. This standard has recently been summarized by a reviewing court as follows:

> [T]he Commission may lawfully allow, and indeed encourage, entry of multiple carriers offering overlapping services, if it has reviewed the characteristics of the particular communications field involved and rationally concludes that competition in that field predictably would further the public interest in larger, more economical, and more effective service. Essentially, the Commission must be able reasonably to forecast, first, that new entry will not so severely impair the economic base of existing carriers that the industry would experience an incidence of failure so high as to impair provision of service to the public and, second, that injection of new providers will probably result in better, cheaper, or more innovative communications offerings. These forecasts must have some ascertainable foundation in the record; at the same time, however, conclusions on the future conduct of licensees, the anticipated reaction of investors, the expected course of technological development, and other assumptions about the functioning of tomorrow's communications market are unavoidably exercises in prediction. For such prognoses, we can require only that the agency's decisional memoranda reveal that it identified all relevant issues, gave them thoughtful consideration duly attentive to comments received, and formulated a judgment which rationally accommodates the facts capable of ascertainment and the policies slated for effectuation (footnotes omitted).[21]

28. The public interest considerations discussed below lead us to the conclusion, under the *RCA* standard, that we should set aside the *TAT-4* policy which limits AT&T's international service offerings and that we should also set aside any policy which may exist which limits the IRCs' offerings.

C. Voice/Record Dichotomy

29. The existing voice/record dichotomy in the provision of international services is rooted in the historical differences between international voice and record technologies, the provision of international voice and record services by different carriers, and the employment by these carriers of separate networks. The pre-1964 history of the international industry is traced in the NPRM and various pleadings, and need not be repeated here. What is important to emphasize here is that prior to 1964 no definitive policy existed as to IRC and AT&T service offerings. In our 1964 *TAT-4* decision we clearly limited the service offerings of AT&T. The *TAT-4* decision did not place any limitation on the offerings of the IRCs. In fact, no clear policy ban on IRC voice offerings has evern been enunciated by this Commission. Reference to a general policy of service separation appears as dictum in at least one Commission order prior to 1964. However, this and similar decisions did not establish a clear barrier to the

[21] Telocator Network of America v. FCC, No. 78–2218, slip op. at 40–41 (D.C. Cir. Oct. 5, 1982).

provision of international voice services by the IRCs.[22] In sum, we believe that the bar on AT&T is clearly stated in our *TAT-4* decision while the existence of any bar on the IRCs is less clear.

D. Regulatory Approach

30. We anticipate that the introduction of established carriers into new markets will bring users better services, new offerings, more options and lower charges. We have in recent years adopted a number of orders which reflect our belief that the public interest is best served by removing unnecessary restrictions which bar or inhibit the operations of carriers. These initiatives in the domestic voice, domestic record and international record markets have been based on the premise that the statutory public interest standard can be best met by allowing marketplace forces to control entry, exit and the extent of competition. In allowing firms greater flexibility to enter new markets and to align their services to respond to user requirements, we have removed artificial barriers to entry, mandated structural changes to assure fair competition, and simplified filing requirements.[23] In so doing we have consistently found that additional competition in an expanding market is reasonably feasible and will serve some beneficial purpose.[24]

31. Concomitant with the adoption of this regulatory approach is the acknowledgement that not every new entrant will succeed and that not every existing carrier will remain competitive. There should be no doubt that our responsibility is to the public interest, not to the private financial

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[22] *See* AT&T, 27 FCC 113 (1959). The exact reasons surrounding the IRCs' failure to provide international voice services over existing facilities or to request authority for additional facilities to provide international voice services can only be the subject of speculation. Policy misconceptions, high start up operating costs, anticipated operating losses, perceived difficulties in modifying or obtaining new operating agreements, technical and engineering difficulties (facility access, interconnection arrangements, numbering plans, etc.) or fear of an AT&T response requesting symmetrical entry into the international record market may have contributed to the business decision apparently made by the IRCs not to provide international voice services.

[23] *See* Specialized Common Carrier Services, 29 FCC 2d 870, *recon. denied*, 31 FCC 2d 1106 (1971). *aff'd sub nom.* Washington Utilities and Transportation Commission v. FCC, 513 F. 2d 1142 (9th Cir.), *cert. denied*, 423 U. S. 836 (1975); International Record Carriers' Scope of Operations (Gateways), 76 FCC 2d 115 (1980), *aff'd sub nom.* Western Union Telegraph Company v. FCC, 665 F.2d 1126 (D. C. Cir. 1981); Domestic Public Message Services (PMS), 71 FCC 2d 471 (1979), *aff'd sub nom.* Western Union Telegraph Company v. FCC, No. 79–1352, slip op (D. C. Cir. Sept. 3, 1981); American Telephone and Telegraph Company (Dataphone), 76 FCC 2d 682 (1980), and Western Union International, Inc., *et. al.* (Datel), 76 FCC 2d 166 (1980), *aff'd sub nom.* Western Union International, Inc., 673 F. 2d 539 (D.C. Cir. 1982); RCA Global Communications, Inc. *et al.*, 88 FCC 2d 905 (1982); Western Union Telegraph Company, FCC 82–378 (released August 12, 1982); Second Computer Inquiry, 77 FCC 2d 384 (1980), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.*, C.C.I.A. v. FCC, No. 80–1471, slip op. (D.C. Cir. Nov. 12, 1982); Competitive Common Carrier Services, 77 FCC 2d 308 (1979), 85 FCC 2d 1 (1980), 84 FCC 2d 445 (1981), and FCC 82–187 (1982).

[24] *See* FCC v. RCA Global Communication, Inc., 346 U.S. 86 (1953) and Mackay Radio and Telgraph Company, 28 FCC 231 (1960).

interests of any particular carrier or group of carriers. This regulatory approach was stated with abundant clarity in our *Authorized User* decision.[25] If a carrier cannot compete after the establishement of a fair competitive environment, it will likely be because its customers have selected a competitor which offers a better sevice, a lower price or additional conveniences. Better services, lower prices or additional conveniences for the customer are results that we expect to occur through additional market entry and increased competition. The issue of adverse impact on revenues or market shares where competition is fair is unimportant unless it can be clearly demonstrated that such an impact will adversely effect services to the public and outweigh the anticipated benefits of additional competition.

E. Industry Structure

32. The IRCs aruge that the relative size and market positions of AT&T and the IRCs have not significantly changed since 1964. Employing data from their study, the IRCs state that the structure of the international telecommunications market has not significantly changed and that no modification of the *TAT-4* policy is warranted. AT&T does not refute the data, all of which are public information from IRC and AT&T filings or Commission tabulations.

33. We do not question the market comparison data presented by the IRCs for the 1964–1980 period. We agree with the IRCs that AT&T was and continues to be the major U.S. carrier in terms of revenues, earnings, plant, employees, and percentage of Gross National Product. We also agree with the IRCs that on merely percentage terms the relative position of the carriers has not substantially changed since 1964. However, we believe that the approach taken by the IRCs ignores the dynamic changes that have occurred in the telecommunications industry in the last eighteen years. These changes can be demonstrated by: (a) analyzing data relating to IRC growth; and (b) surveying the development of digital technology.

34. IRC Growth. The data presented by the IRCs actually reflect a situation greatly different from that which existed in 1964. The data show an industry experiencing strong growth and vitality. The data also show the carriers serving this industry to be viable and stable entities. As we stated in the NPRM:

> The IRCs are no longer struggling enterprises with dubious financial futures which must be kept afloat because they are the sole providers of a crucial service. The IRCs are now firmly established businesses with significant market shares, substantial rate bases, and impressive rates of return.

[25] *See* Authorized User, FCC 82–357 (released August 19, 1982) at para. 56.

We also pointed out that:

> IRC gross plant investment has grown from nearly $200 million in 1964 to approximately $700 million in 1978, a 12% growth rate in 1972 dollars. . . . Revenues from message, telex and private line services have increased from $89.9 million in 1964 to $397.8 million in 1978, a 15.1% growth rate in 1972 dollars.

Data available since the release of the NPRM reflect continued growth of the international record market and the revenues of the carriers which provide international service. By year-end 1981, IRC revenues had increased to approximately $578 million and plant investment stood at $939 million. Thus the IRCs, the majority of which are affiliated with large corporate entities, have grown rather than stagnated during the last seventeen years. During this time period, plant investment has increased by over 500% and renenues have grown by over 600%. Most importantly, the international record market will continue to expand, thus providing the IRCs with the opportunity to compete from solid bases.[26]

35. Disparity of size cannot alone be a basis to preclude or limit competition. Many carriers much smaller than the IRCs now compete with AT&T domestically. The key is establishing an environment in which competition can survive or at least in which entities can compete fairly. Additionally, unlike in 1964, the IRCs now provide wholly domestic record services, are no longer limited to a few gateway cities, and may interconnect with their domestic affiliates and other carriers. As stated by the United States Court of Appeals for the District of Columbia in affirming our *Datel* and *Dataphone orders:*

> The IRCs, it seems clear, are no longer an infant industry in special need of extraordinary protection. Through the Datel order and related decisions, (footnote omitted) the FCC strengthened the position of the IRCs by securing to them expanded domestic operation centers and enhanced voice capacity.[27]

36. *Digital Technology.* Major improvements in the performance and cost-effectiveness of solid state electronics have played a major role in revolutionizing telecommunications facilities and networks. These improvements, which were spurred in part by the enormous demand for information transfers, have resulted in the development of digital switches, loops and lines. Digital technology is becoming more cost efficient for a significant portion of telephone interoffice trunks and circuits as well as switches. Digital transmissions are also critically important to computer processing and the efficient transmission of data.

37. Digital networks economically employ resources, provide users with broad flexibility as to service options and promote facility efficiency.

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[26] Data on future market growth indicates continued expansion. *See Docket Nos. 18875, 79–184 and 81–343 (Atlantic and Pacific Planning).*

[27] Western Union International, Inc., v. FCC, 673 F. 2d at 543 (D.C. Cir. 1982).

Digital signals are compatible with the data signals of computers as well as with voice signals, and can be stored and processed in convenient and sophisticated ways. They can be transmitted economically by reducing the bandwidth requirements or by sharing communications circuits using techniques such as time division multiplexing and packet switching. They can also be transmitted with more accuracy than previously possible since error detection techniques and error correction codes are now used, and since wide dynamic ranges can be handled. Greater flexibility is another characteristic of digital signalling because it permits a trade-off between distortion and noise immunity. Digital bitstreams can also be encrypted to provide greater security and privacy. Finally, digital technology is compatible with evolving services such as videotex and teletex, and we anticipate that digital equipment will continue to replace analog apparatus as digital networks expand.

38. Unlike circuits in existing analog systems which are usable for voice and data transmissions, but which are ordinarily conditioned for either voice or data, circuits in a digital network can be viewed as transparent pipelines which make no distinction between such transmissions. In a digital network, both voice and data transmissions are transformed into pulses (bits), transmitted through the pipeline to the desired phone/terminal/computer, and then reconstructed. In view of the deployment of transparent pipelines and digital networks, it makes little sense for a user of international services to acquire a transparent pipeline from a voice carrier for only voice requirements and a second transparent pipeline from a record carrier for only data requirements. We do not require this possibly wasteful duplication of facilities of domestic users and we see no reason to continue to require it of international users. As ITT points out, the existing dichotomy could be preserved. However, the cost to society in terms of money, convenience and system efficiency would, as emphasized by NTIA and the commenting users, be substantial. Moreover, the transparency of the digital pipeline would make enforcement of this dichotomy impossible. Our view of evolving technology is shared by DoD, SBS, AT&T and NTIA. We particularly point to the comments of NTIA and to its declaration that:

> An artificial voice/record dichotomy will be meaningless in the evolving digital environment leading to an ISDN. Furthermore, any attempt at maintaining artificial market distinctions despite advances in technology would involve system suboptimization and could prove costly in terms of higher facility costs and consumer rates with resultant service constraints. (NTIA comments, pages 7–8).

39. We therefore find that the existing market structure and industry have substantially changed or will substantially change in the not too distant future. Thus, the rationale for the *TAT–4* decision has been

dissipated by the growth of the IRCs and the development of digital networks.[28]

F. IRC Study

40. We note that the IRC study does not recommend a moratorium or bar on Commission authorization of new entrants to provide international record services. First, the study advocates the entry of non-dominant carriers. Secondly, as to the possible entry of Western Union and AT&T, the study states:

> Entry by Western union could be permitted, but only after establishment of appropriate structural and regulatory safeguards. These would assure that any overseas Western Union services would not be cross subsidized by domestic services and that Western Union could not use its control of essential ("bottleneck") facilities to the detriment of competitors. Appropriate and fair interconnection arrangements should be worked out beforehand between Western Union and the IRCs.
>
> Only after other alternatives have been tested, should the Commission consider permitting AT&T to enter the overseas record industry generally, and then only under special terms and conditions. Before such entry is permitted, issues related to the IRCs' interconnection arrangements with AT&T should be resolved. Additionally, structural separation of Bell's overseas services into facilities and services subsidiaries should be required as a condition precedent to entry.[29]

The RCCA coupled with our Interim Order[30] and tariff decision[31] establish competitive safeguards and interconnection arrangements generally consistent with the study's recommendations regarding Western Union entry. As to AT&T entry, it is not clear from the record before us that a similar approach is appropriate.[32] Certainly the record here is insufficient

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[28] The AT&T divestiture supports our finding that circumstances have significantly changed since 1964. Under the divestiture plan, which is now scheduled to be implemented in early 1984, AT&T will divest its twenty-two operating companies which currently account for most of its plant and employees and which generate a substantial percentage of its revenues. In accordance with the divestiture plan AT&T will gain facility access from the divested entities on terms and conditions and at rates equal to that offered to other common carriers. AT&T will therefore have to compete on equal terms with other interexchange carriers, including the IRCs.

[29] IRC study at pages xviii and 138.

[30] Interconnection Arrangements, 89 FCC 2d 928 (1982).

[31] Interconnection Arrangements, FCC 82–264 (released June 11, 1982).

[32] For example, the facilities used to provide record communications services which Western Union and the IRCs were required to fully interconnect pursuant to the RCCA were already in existence, were known to be technically compatible and were already interconnected for international transmissions. The same situation does not exist as to AT&T record or IRC voice services. Since any new switched record services of AT&T and any new switched voice services of the IRCs are not now in existence, the feasibility of interconnection, i.e. whether these future services would be technically compatible with existing networks and therefore possibly suitable for interconnection with those existing networks, can only be the subject of speculation at the present time.

to prescribe any interconnection arrangements. Indeed, the carriers do not describe with any degree of specificity the arrangements that they desire. Most importantly, we regard interconnection as a separate matter which requires an initial request under Section 201 or 222 of the Act by the carrier desiring interconnection prior to any Commission action.[33] If interconnection proves necessary or desirable and is not readily forthcoming, we will entertain requests from the IRCs and may consider such issues in conjunction with any applications filed by AT&T pursuant to Section 214 for additional facilities to provide new international services.[34]

41. In analyzing the IRC study we must emphasize that we do not subscribe to the study's stated conclusions regarding future IRC revenue trends due to AT&T's or Western Union's entry into the record market.[35] The study contains several speculative assumptions regarding projected IRC revenue diversion. These assumptions seriously undermine the study's value as a predictive model. For example, the study estimates that during the year 1985, 94% of IRC Telex profits (net income) will be diverted to AT&T if it is authorized to enter the record market. This estimate, however, is based upon a combination of three underlying assumptions each of which could well prove to be inaccurate. These assumptions are as follows: First, that the average annual growth rate of telex revenues and IRC profits during the 1981–1986 period will equal the average annual growth rate during the previous five year period. Second, that the IRCs have accurately estimated the future revenue diversions which could occur through 1985 if AT&T or Western Union entered the record market. Third, that these projected dollar losses in revenue would translate into an identical dollar loss in profits (net income). In the telex example cited in the study, it is estimated that IRC revenues from telex would decline 7% from $373 million in 1981 to $347 million in 1985, were AT&T to enter the market. The study, however, translates this 7% revenue decline into a 94% decline in profits based upon the three aforementioned assumptions: (a) IRC telex revenues might have grown to $656 million by 1985 assuming a growth rate equal to the previous five year period. Thus, the decline in revenues is expressed not as the actual decrease from $373 million to $347 million but rather as a decline from hypothesized future revenues of $656 million to $347 million; (b) this $309 million revenue diversion estimate is based upon unspecified IRC projections regarding the recasting of market shares; and (c) it is assumed that the estimated $309 million revenue loss would result in an identical $309 million loss in net income (profits).

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[33] See para. 56, infra.

[34] We note that the initiation of any new service offering between the United States and a particular foreign point requires the cooperation and agreement of that foreign administration.

[35] IRC study, Chart 25.

42. We cannot conclude that any of these assumptions are valid for decisional purposes. In particular, we cannot accept the IRCs' projections of revenue diversion which are unsupported by any factual information. Further, we cannot agree that the projected revenue decline would translate to an identical net income decline. In fact, such a scenario would be atypical since it presumes that expenses would remain constant rather than decline in the face of falling revenues. Additionally, we cannot accept the study's analysis of future market shares and trends because it does not evaluate the effect of the interconnection, transiting and pro rata requirements of the RCCA and the Interim Order, and does not consider IRC domestic expansion, IRC competitive responses and IRC new service offerings.

43. Even if we were to accept the conclusions of the study, they do not provide a basis for altering our tentative decision regarding AT&T entry into the record market.[36] The study indicates that AT&T entry would reduce the IRCs' expected future revenues by approximately 31% for the 1981–1985 period. Such a diversion, it is claimed, would curtail the IRCs' growth and eventually result in a negative growth trend. However, in view of the telex market's projected annual growth rate of 15.1%, and accepting the estimates of revenue diversion to AT&T, IRC telex revenues in 1985 would decline by only 7% from current (1981) levels. In short, any revenue diversion from the IRCs to AT&T would largely be offset by the growth in the market demand for telex or telex type services. Stated differently, the IRC's revenues from telex would be 31% less than they would otherwise be absent AT&T entry, but by 1985 they would actually have declined only 7% from current (1981) levels. Thus, even assuming the accuracy of the study's assumptions, we cannot conclude that the revenue diversion would be so great as to threaten service to the public in a manner which would outweigh the benefits of increased competition.

44. Furthermore, the IRC study appears to ignore the probability that increased competition within a market will expand the market. That is, there is not a set amount of record revenues, any gain of which by AT&T can be claimed by the IRCs as a loss. Rather, vigorous marketing by new entrants often increases the demand for service i.e., increases the size of the revenue pie. Thus the IRCs could have a smaller share of a growing pie and still experience revenue growth. We recognize that the IRC study does not consider the effects of the combined entry of Western Union, AT&T and possibly other carriers, including Comsat. Entry of these

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[36] As to Western Union entry, we have already determined that the provision of international service by Western Union would be consistent with the RCCA's direction to promote the development of fully competitive domestic and international markets in the provision of record communications services. In employing the *RCA* standard as an alternative basis for our decision, we found that entry into the expanding international record market was reasonably feasible, would not adversely effect the IRCs, and would be beneficial to users.

carriers would place in the market entities with considerable resources and customer bases, thus making vigorous competition all the more likely and the evolution of increased market concentration less likely. We view these probable effects of combined entry to be consistent with our regulatory approach and to be beneficial to users. We do not believe, and the IRCs have not demonstrated, that combined entry by Western Union, AT&T and Comsat will result in increased market concentration and the offering of less desirable service. In short, even assuming a worse case scenario, it does not appear likely that the IRCs will suffer irreparable injury and, most importantly, that service to the public will be adversely effected by additional entry. To the contrary, we believe that there will be significant benefits to the public as a result of our decision.

G. Other IRC Concerns and Public Benefits

45. The IRCs call our attention to Sections 313 (application of antitrust laws) and 314 (preservation of competition) of the Act. To the extent that these Title III sections are applicable to the subject matter of this proceeding, we believe that we have adequately considered these points. Section 313 relates to unlawful restraints and monopolies in the manufacture and sale of and trade in radio apparatus and devices. Section 314 relates to control of wireline and radio facilities for the purposes and/or effect of substantially lessening competition. We believe full market entry by AT&T and the IRCs will stimulate competition, particularly in view of the AT&T divestiture and the safeguards which will be established. We further do not believe that full market entry by AT&T and the IRCs will have any significant effect on the manufacture, sale or trade of telecommunications equipment. We therefore reject the IRCs' contention that lifting the *TAT–4* bar would be contrary to either the language or spirt of these two sections.

46. The IRCs contend that the international record market is presently competitive, that the carriers providing international record service are efficient and innovative, and that additional entrants are not needed. The IRCs view their industry as competitively balanced and particularly claim that AT&T's entry will destroy rather than promote competition. We disagree. First, the fact that more than one service provider is in a market does not necessarily mean that there is effective competition. In fact, price competition has rarely existed in the international record market.[37] The IRC filings, historically high rates of return, and the eagerness of new entities to gain market entry support this view of the international record market.[38] Secondly, we have already outlined and

[37] The IRCs compete, on a limited basis, on service and convenience terms rather than on price. See Preliminary Audit and study of Operations of International Carriers and Their Communications Services Between the United States and Overseas and Foreign States, 75 FCC 2d 726 (1980).

[38] The IRCs themselves point to the large number of new entrants.

will discuss further below the benefits that removing operating restrictions will bring to users. Finally, the IRCs' argument that a competitive market exists into which additional competition should not be introduced is similar to the argument made by RCA and rejected by the Supreme Court in the previously cited *RCA* decision. In the *RCA* decision the Court clearly indicated that duplicating authorizations are in the public interest wherever competition is reasonably feasible and would serve some beneficial purpose.[39] Moreover, if the IRCs are as innovative and efficient as they claim, they should not be adversely affected by new entry. In view of these factors, the anticipated benefits of competition, and the reasonable feasibility of additional competition, we must reject the IRCs' contention that additional competition would not be in the public interest.[40]

47. The IRCs also contend that AT&T entry will lead to the imposition of disadvantageous operating agreements by foreign administrations on the IRCs. In response, AT&T suggests that several foreign correspondents have recently shown interest in developing more competitive domestic networks. AT&T also suggests that overseas entities have recently shown more willingness to deal with multiple U.S. carriers. No evidence has been presented by the IRCs to demonstrate that existing operating agreements or procedures will be unfairly modified or terminated. We believe, however, that this is an area that will acquire strict carrier adherence to Commission policies relating to whipsawing. Moreover, we have the power under the Act to coordinate the positions of U.S. international service carriers and to take action against any U.S. carrier that operates in a manner inconsistent with the public interest.

48. As to the relationship between our *Computer II* orders and our decision to remove restraints on the non-voice service offerings of AT&T, our decision today permits AT&T to provide basic record and data services on a parimary basis between the United States and foreign points.

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[39] 346 U.S. at 96–97 (1953).

[40] Full market entry by both AT&T and the IRCs is also consistent with the Record Carrier Competition Act of 1981, Congress' most recent legislative pronouncement regarding the international telecommunications market. Although the focus of the RCCA is record carrier provision of record communications services and does not specifically apply to either AT&T entry into the international record market or IRC entry into the international voice market, our action here relating to international services is a natural extension of the philosophy of that Act. Section 222(b) (1) states:

> The Commission shall, to the maximum extent feasible, promote the development of fully competitive domestic and international markets in the provision of record communications services, so that the public may obtain record communications service and facilities (including terminal equipment) the variety and price of which are governed by competition.

Additionally, the House Committee Report emphasizes that the Commission is instructed to promote the development of fully competitive markets and to rely on market forces to protect the public interest. Energy and Commerce Committee Report of the House of Representatives, Report No. 97–356, 97th Cong., 1st Sess. (Dec. 3, 1981).

The provision of enhanced services by AT&T between the United States and foreign points is governed by our *Computer II* policy.[41]

49. The IRCs have suggested that any AT&T entry into the international record market be done through a separate subsidiary. Under the IRC scheme AT&T would continue to provide international voice service while a new entity would be created to provide international record services. We reject this proposal. The IRC plan would substantially negate the evolving advantages of digital networks and transparent pipelines. Upon the deployment of digital networks a user with both international voice and record requirements could select service from AT&T or an IRC which would provide a transparent circuit for both voice and record requirements. However, under the IRC plan, a user could not satisfy both voice and record requirements in getting service from AT&T. Instead, the user would have to obtain record services from an AT&T subsidiary. This arrangement would substantially reduce for AT&T and its customers the anticipated benefits of evolving technology. An AT&T customer would be required under the IRC plan to obtain and pay for two separate circuits where one circuit could suffice. We view the IRC proposal to require AT&T to establish a separate subsidiary for its Title II record and data services offered between the United States and foreign points as unnecessary, as promoting inefficiency, as contrary to technological developments, as increasing user costs and as therefore not in the public interest.

50. We are confident that the removal of the *TAT–4* policy restriction on the international service offerings of AT&T will have beneficial results. The removal of unnecessary operating restrictions and the introduction of additional competitors into expanding markets has previously resulted in real benefits for users in the domestic voice, domestic record and international record arenas. We anticipate that these same benefits—additional user choice as to carriers, more service options, added conveniences and lower rates—will also result from AT&T's entry into the international record market. We also anticipate that the further development of digital networks will augment these benefits.

H. IRC Voice Services

51. There can be little doubt that IRC entry ino the expanding international voice arena is reasonably feasible. International voice service, measured in terms of circuits, minutes or revenues, has shown dramatic

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[41] As offerings not subject to Title II regulation, enhanced services provided by AT&T must be offered through a separate subsidiary such as American Bell. *See* Amendment to Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384 (1980), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.*, C.C.I.A. v. FCC, No. 80–1471 slip op. (D.C. Cir. Nov. 12, 1982).

growth. Revenue growth and profitability are two of the most important measurements of competitive feasibility. Between 1975 and 1981 revenues from international voice services increased aproximately threefold. While most of the revenue growth in this period is attributable to IMTS ($576 million to $1.67 billion), steady growth also occurred in private line revenues (11.7 million to $13.7 million). International voice services have also been quite profitable. AT&T, the largest provider of international voice services, earned rates of return during the last several years general above its permitted overall rate of returnly.[42] The IRCs are established carriers with customer bases and the operating expertise to provide new services, additional conveniences for users, or duplicative offerings at lower rates. AT&T's revenues from international voice services are substantial but are not a significant percentage of its overall income. AT&T does not argue adverse impact on its financial status and we do not anticipate such a result. We therefore conclude that competition in the provision of international voice services is reasonably feasible.

52. Furthermore, voice-only service by the IRCs will broaden their service offerings, increase their operating flexibility and potentially promote a more efficient use of their plant. This could reduce costs and lead to lower rates. In a separate item before us today we grant several pending IRC applications for facilities to provide leased channel voice service. In their applications the IRCs indicate that they have secured customers and the agreement of at least one major overseas entity, and are ready to provide service at a rate substantially below that now available from AT&T. Thus, our action here will have immediate tangible benefits. The provision of international voice services by the IRCs thus satisfies the standard for entry established by the Supreme Court in its *RCA* decision,[43] will be in the public interest and justifies a clarification of Commission policy.

I. TAT–4 Conclusions

53. Based on the record in this proceeding and the additional information described above, we warrant that the elimination of the voice/record dichotomy in the provision of international services is required by the public convenience and necessity. Consistent with the *RCA*, *MacKay* and *Telocator* decisions we find that full market entry by AT&T and the IRCs is reasonably feasible and will serve beneficial purposes. This decision is based on our findings that the international telecommunications market has experienced substantial growth in both the voice and record seg-

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[42] AT&T's rate of return for international services was 15.5% in 1977, 23.0% in 1978, and 36.5% in 1979. Although exact data is unavailable for 1980 and 1981, we believe that AT&T's rate of return for 1980 was nearly 20% and that its rate of return for 1981 was somewhat less due to tariff revisions.

[43] FCC v. RCA Global Communications, Inc., 346 U.S. 86 (1953).

ments; that this growth pattern will continue; that AT&T has been and continues to be the major U.S. provider of telecommunications services/facilities; that the IRCs earnings and revenues have increased significantly since 1964; that the IRCs are no longer struggling enterprises with dubious financial futures which must be protected from competition; that the removal of all restrictions on the service offerings of carriers is consistent with evolving technology; that additional competition will not irreparably harm either AT&T or the IRCs; and that the removal of service restrictions will enhance efficiency, consumer options and price competition.

54. Our action today is an important step in achieving our goal of providing users with greater carrier and service options as well as establishing an environment to stimulate lower rates. IRC entry into the expanding international voice arena will neither impair AT&T's economic viability nor adversely effect service to the public. Moreover, the IRC applications which we grant today will result in tangible financial benefits to users. We anticipate that future IRC applications will provide similar benefits to users. AT&T entry into the growing international record market will clearly impact the future revenues of the IRCs, but will neither threaten the economic viability of the IRCs nor adversely effect service to the public. Additionally, we expect that AT&T entry into the international record market will provide users with additional service options and create a downward pressure on existing rates.

55. Lastly, the full market entry by both AT&T and the IRCs is consistent with evolving technology and permits these carriers to utilize facilities in the most efficient manner possible. The development of digital technology and the deployment of digital networks are important occurrences in the telecommunications industry. Digital networks permit carriers to employ their resources and facilities with greater efficiency and flexibility, advantages that are transferred to users in the form of additional options and conveniences as well as lower charges. Retention of an artificial market segmentation would be inconsistent with full utilization of digital networks and with the public interest.

IV. INTERCONNECTION

56. Having found that removing service restrictions on carrier's international operations will serve the public interest, we now turn to the separate issue of carrier interconnection. Several parties have identified interconnection arrangements as an issue which should be resolved. However, as we have noted, the existing record is insufficient for us to prescribe any interconnection arrangements and/or tariff revisions for either voice or record services which may be necessary. While we may at some future date have to resolve an interconnection dispute relating to the elimination of the voice/record dichotomy, that is an issue upon which

the carriers ordinarily have initial responsibility under the Act. Pursuant to Section 201(a) of the Act, a carrier is required to provide interconnection upon reasonable request. We may order interconnection if, after an opportunity for hearing, we find such action to be necessary or desirable. In the circumstances presented here where the technical characteristics and compatibility of the new services are unknown, an approach based other than on Section 201 would be clearly premature.[44]

V. ORDERING CLAUSE

57. Accordingly, IT IS ORDERED that the voice/record dichotomy in the provision of international services is eliminated, that full market entry by AT&T and the IRCs will be permitted, and that the restrictions on AT&T service offerings enunciated in the *TAT–4* decision are removed.

58. IT IS FURTHER ORDERED that this proceedings is terminated.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico Secretary

CONCURRING STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY IN WHICH COMMISSIONER JAMES H. QUELLO JOINS

IN RE: OVERSEAS COMMUNICATIONS SERVICES.

I concur in this decision because of the reasons stated in my dissent in *GTE Telenet Communications Corporation et al.*, FCC 82–377, 91 FCC 2d 232 (1982). In this Order the Commission has once again, on the strength of a footnote, declared a policy which it has never considered. The dictum contained in the "mysterious" footnote 4 of the *Computer II Reconsideration Order cannot serve as an adequate basis to deregulate international enhanced services and, thereby, establish resale internationally. To reaffirm this policy in another footnote serves only to compound the original error in an effort at intellectual bootstrapping which falls.*

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[44] Section 201(a) states: It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

[1] Overseas Communications Services, 84 FCC 2d 622 (1980).

Common Carrier, Status of
Domestic Fixed Satellite
Satellite Domestic Communications

Domestic satellite space station licenses modified at applicant's request to permit offering of transponders on a noncommon carrier basis. Such offering is consistent with the polices articulated by the Commission in Docket 82–45, Domestic Fixed-Satellite Transponder Sales, FCC 82–351, 90 FCC 2d 1238.
—*Southern Pacific Satellite Co.*

FCC 82–512

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON D.C. 20554

In the Matter of the Application of SOUTHERN PACIFIC SATELLITE COMPANY For Modification of Domestic Fixed-Satellite Space Station Authorization to Permit Noncommon Carrier Transponder Transactions	File No. 996–DSS–MP/ML–(4)–82

ORDER AND AUTHORIZATION

Adopted: November 18, 1982; Released: November 29, 1982

BY THE COMMISSION: COMMISSIONER FOGARTY DISSENTING AND ISSUING A STATEMENT.

1. In *Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238 (1982), appeal pending *sub nom, Wold Communications, Inc. v. FCC*, (D.C. Cir., No. 82–2054, filed, September 10, 1982) (*Transponder Sales Order*), the Commission granted the applications of three domestic satellite space station licensees to offer transponders to users on a noncommon carrier basis. Southern Pacific Satellite Company's (SPSC) pending modi-

fication application[1] was deferred at that time because the public did not have an opportunity to respond to a recently filed major amendment to its application. The amendment was received on July 21, 1982, placed on public notice on July 23, 1982 and the Commission adopted its *Transponder Sales Order* on July 29, 1982. Comments to the SPSC amendment were filed on August 6, 1982 by Wold Communications, Inc. (Wold). In addition, Petitions to Deny the SPSC application were earlier filed by Wold and Satellite Syndicated Systems.

2. In its amendment, SPSC indicates that it will select the entities to be offered transponders on a noncommon carrier basis on the SPSC satellites. It is now negotiating on a bilateral basis with a limited number of potential customers for sale of SPSC transponders. It plans to sell transponders to these seleced customers at a negotiated fixed price payable in full upon execution off the sales contract.[2] Although the company has not at present disposed of any transponders on a noncommon carrier basis, it has asked for authority to offer transponders on a noncommon carrier basis on Spacenets II and III. Its plans, however, call for the noncommon carrier offering of only ten transponders on each of these satellites or a total of 20 transponders. The transponders on Spacenet I and the remaining transponders on Spacenets II and III will be used for the provision of common carrier service.

3. Wold in its comments to the SPSC amendment argues that its modification application is incomplete since it does not indicate whether the transponders it seeks authority to offer on a noncommon carrier basis are 36 MHz or 72 MHz transponders. It also claims that SPSC has failed to reveal the amount of its remaining satellite capacity which will be subject to protection. Other issues raised in the Petitions to Deny were fully disposed of in our decision in the *Transponder Sales Order.*

4. We believe that the amendment supplied by SPSC provides us with sufficient information to find that the proposal for Spacenet II is in the public interest and that it is consistent with the policies and procedures adopted in the *Transponder Sales Order.*

5. In the public policy analysis contained in the *Transponder Sales Order* we assumed that in a "worst case" analysis that SPSC would sell up

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[1] On October 26, 1982, GTE Corporation and Southern Pacific Company applied for Commission consent to the transfer of control of SPSC to GTE. This Order addresses only the question as to whether transponders can be offered on a noncommon carrier basis on a previously authorized satellite. Any issues raised by the GTE acquisition of SPSC will be dealt with in the appropriate proceeding, and this action is without prejudice to any action we may take on those applications.

[2] In the event that SPSC's transponders have a useful life of more than 7½ years, SPSC proposes to negotiate with its buyers for an additional payment. The probability is 70% that all of the SPSC transponders will be capable of operation after seven years in orbit. *See* Southern Pacific Communications Company, 84 FCC 2d 650, 652 (1982).

to 52 of the 72 equivalent 36 MHz transponders[3] on its authorized Spacenets I and II satellites. *Id.* at para. 37. However, in its amendment SPSC states that it will offer on a noncommon carrier basis only 10 transponders on a currently authorized in-orbit satellite (Spacenet II). It has further indicated that of those ten transponders between six and eight will be wideband 72 MHz transponders.[4] Therefore, on Spacenet II if the ten transponders it offers on a noncommon carrier basis consists of eight wideband 72 MHz transponders and two narrowband 36 MHz transponders (for a total of 18 equivalent 36 MHz transponders), it will still have available on a common carrier basis 54 of the 72 equivalent 36 MHz transponders on its two presently authorized in-orbit satellites. This is 75% of its total authorized in-orbit capacity. Such a limited noncommon carrier offering is significantly less than 52 transponders considered in the public policy analysis contained in the *Transponder Sales Order.* Also, we believe that the SPSC's long term offerings are consistent with the sale proposals examined in that Order.[5]Therefore, we do not believe designation of the specific transponders which SPSC plans to offer on a noncommon carrier basis, or more specific information with regard to its protection policy, is necessary to oru consideration of the modification request at this time. Under current circumstances, we believe that such detailed specification would unduly limit SPSC's marketing efforts without materially assisting us in our review of the application.

6. Thus, we will provide SPSC authority to offer ten transponders on its Spacenet II satellite on a noncommon carrier basis. However, in accordance with our previous decision, we will defer consideration of the SPSC proposal to offer transponders on Spacenet III on noncommon carrier basis until such time as we consider the Title III application for the launch and deployment of that satellite.

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[3] Each Spacenet satellite has 12 narrowband 36 MHz transponders in the 4/6 GHz bands, six wideband 72 MHz transponders in the 4/6 GHz bands and six wideband 72 MHz transponders in the 12/14 GHz bands. For the purposes of this discussion, each wideband 72 MHz trasnponder is counted as two equivalent 36 MHz transponders to allow for consistent treatment of both wideband and narrowband transponders. Thus, each Spacenet satellite has 36 equivalent 36 MHz transponders.

[4] *See* letter from James M. Tobin, Asst. General Counsel, SPSC, to Secretary, Federal Communication Commission, October 26, 1982.

[5] While one feature of the SPSC proposal, the extra negotiated payment (*see* n.2 *supra*), is somewhat different than the other sales proposals we considered, we believe that the proposal as a whole is consistent with the analysis presented at pages 1255–1257 of the *Transponder Sales Order.* Like the sales proposals of the three other satellite licensees approved in the *Transponder Sales Order,* SPCC plans to enter into stable long term contractual relationships with individual customers to provide technically and operationally distinct portions of a satellite. These contractual relationships provide the license with the ability to individually tailor each offering to meet the customer's particular needs. *Id.* at 1257. This ability to tailor services has recently been held by the U.S. Court of Appeals to be crucial to the determination that enhanced services are not common carriage under the Communications Act. *See* Computer and Communications Industry Association v. FCC, (D.C. Cir., No. 80–1471, November 12, 1982), at 25–26.

7. Accordingly, IT IS ORDERED, that Application File No. 996–DSS–MP/ML–(4)–82 IS GRANTED and Southern Pacific Satellite Company IS AUTHORIZED to offer ten transponders on its Spacenet II satellite on a noncommon carrier basis as proposed in its application.

8. IT IS FURTHER ORDERED that the applicant's request to offer transponders on its Spacenet III satellite on a noncommon carrier basis IS DEFERRED until such time as we consider the facilities application for that satellite.

9. IT IS FURTHER ORDERED that the Petitions to Deny filed by Wold Communications, Inc. and Satellite Syndicated Systems, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

DISSENTING STATEMENT
OF
COMMISSIONER JOSEPH R. FOGARTY

IN RE: APPLICATION OF SOUTHERN PACIFIC SATELLITE COMPANY FOR MODIFICATION OF DOMESTIC FIXED-SATELLITE SPACE STATION AUTHORIZATION TO PERMIT NONCOMMON CARRIER TRANSPONDER TRANSACTIONS.

For the reasons set forth in my Dissenting Statement in *Domestic-Fixed Satellite Transponder Sales*, 90 FCC 2d 1238, 1266–1279 (1982), I dissent from this grant of authority to Southern Pacific Satellite Company to provide satellite transponders on a noncommon carrier basis.

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